Real Property, 65 Letter to the Earl of Yarborough on... real property 1850

A

LETTER

TO THE

EARL OF YARBOROUGH,

ON

THE BURTHENS

AFFECTING

REAL PROPERTY

ARISING FROM THE PRESENT STATE OF THE LAW;

WITH

REASONS

IN FAVOUR OF

A General Registry of Titles.

By HENRY SEWELL, Esq.

SECOND EDITION,

WITH A PREFACE REFERRING TO THE

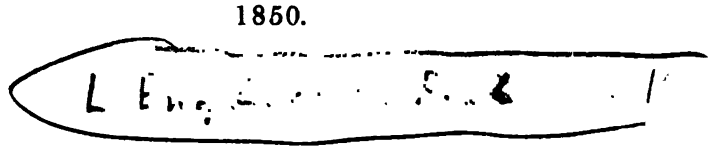
IRISH SALE OF INCUMBERED ESTATES ACT.

LONDON:

HENRY BUTTERWORTH, 7, FLEET STREET,

Law Bookseller and Publisher.

1850.



PREFACE.

I HAVE been induced to republish the following letter partly on account of the subject having been lately brought under discussion, and partly because I am desirous of adding a few remarks.

It has been a matter of satisfaction to me to find the views I have expressed sanctioned by the opinions of others besides myself. Various plans for reforming the Law of Real Property have been suggested, some of them more or less agreeing with my own. These have no doubt originated spontaneously with their respective authors and I refer to them only as evidences of the soundness of a principle which has suggested itself to so many independent judgments.

There are however some points to which I think it would be desirable to draw attention.

It is an obvious mistake to think that such a task as a perfect —well arranged Reform of an important branch of our Law, such as that of Real Property, can be so easy, that it may be undertaken hastily and without a perfect acquaintance with the subject, or a full consideration of the new code of practice in all its practical working. On the other hand, it would be dangerous to regard it as so difficult as that it would alone be practicable to apply rude and violent remedies—that it is necessary to cut the knot which we cannot untie. This would indeed be a fatal error, and whatever relief it might seem to offer us from present difficulties, would certainly lead to worse evils.

I hope I shall not be thought over-critical if I state candidly my views as to some of the various proposals which have been brought before the public.

And first, I think it unfortunate that many of them have been evidently imperfectly digested. This will no doubt be excused on the ground of haste. It is urged upon us that time presses

and something must be done. This is a great fallacy, and tends to obstruct the progress of real reform. Unless you present to the public in a tolerably perfect shape something which will bear the test of criticism and carry upon its face and in all its details the evidence of practicability, whatever you propose will be rejected *in limine;* and as each new crude scheme is developed and abandoned, there will grow up and increase a general feeling of distrust and suspicion respecting all proposals for reform.

The patience with which the country has borne the suspense of nearly four years, waiting the matured results of the Real Property Commission, is a sign that they prefer a little delay to a hasty movement.

On the other hand, it is a more dangerous mistake to suppose that the difficulties of grappling with the question in a careful manner are so great, that we must needs have recourse to violence. People wearied with delay and fretful at continued disappointments are anxious to seize any suggestion for ridding themselves of what they feel to be a grievance. They are ready to hew down the tree because they find some difficulty in pruning the branches or lopping off the dead wood. In this spirit I have heard a serious proposal made to introduce into this country a measure analogous to the Irish Sale of Incumbered Estates Act—one of those remarkable instances of legislation, which will, I think, at some future day, be regarded with surprise, when its principles shall have been perfectly understood and its practical working sufficiently developed.

In the apprehension lest an attempt of this kind may be made, it may be useful to make a few remarks on this Act of Parliament.

And first let me state, what is obvious enough, that one essential condition in the idea of property in every form, is power over it—a simple and absolute controul, co-extensive with its nature and duration, which admits of no right in another to take it without our consent. In destroying or unsettling this fundamental principle, you strike at the root of property itself and reduce it to a state of permissive occupation. No plea of convenience or expediency ought, I am sure, to be permitted to encroach upon it. By adhering to it implicitly, property can alone maintain a high value. This was felt very strongly when the property of the church was vested in the ecclesiastical commissioners. Whatever might have been the benefits of the

measure, no one, I think, has since regarded the state of ecclesiastical property as that of independent ownership.

It is remarkable to observe how rigidly our courts, even in their judicial decisions, observe this rule. A Court of Equity, when it thinks fit to compel a party to transfer a right which has been adjudicated to another, still exerts its compulsory power only over the party himself—forces him to execute whatever deeds may be necessary to effectuate its decree. It does not proceed directly upon the property which is the subject-matter of the decree—it compels a conveyance,—it does not convey.

It would be possible to suggest plausible reasons enough for vesting the whole fee-simple of England in a board of commissioners with absolute powers of improvement or alienation. A thousand excellent schemes might in this way be wonderfully facilitated, but upon the whole the country would not be the gainer by them. Property would in that case cease to be what it is in public estimation; and its depreciation as an object of general desire would be measured by a proportionate diminution of its monetary value.

Any measure therefore which trenches on these first principles ought, I think, to be regarded with extreme jealousy.

The Irish Sale of Incumbered Estates Act comes within the scope of these remarks.

Its object is to vest in a body of commissioners, under certain conditions, a power, upon application made to them by any incumbrancer of real estate, to sell and convey it to a purchaser —to transfer to him by force of their own decree an absolute title to the property sold—divesting, of course, all other titles and interests, so as to create an indefeasible ownership against the whole world. This is what is called a parliamentary title. Whether the act has been framed with sufficient stringency to effectuate this object may perhaps be in some degree uncertain, and can only be brought to the test by future experience. I at present, of course, assume that it is able to work out the intentions of its framers.

Clauses are of course introduced for securing the proper administration of the purchase-money; but this is but a partial provision for the justice of the case, it being obvious that the forcible sale of property against the consent of its rightful owners, or of persons having rightful claims upon it, may be a

wrong for which the due appropriation of the purchase-money may be a very inadequate equivalent.

These commissioners are not, as far as I can judge, armed with any sufficient apparatus for ascertaining and determining rights. They are in fact little more than a ministerial body, whose powers are to be put in motion at the call of any incumbrancer. The individuals in whose hands this vast power is placed are doubtless as learned and honorable men as any who could be selected. This accidental circumstance, however, cannot, it is obvious, be a permanent guarantee againt abuse, nor can it in the nature of things guard against unavoidable lapses through ignorance and error, such as must be inevitable where there is an absence of sufficient power of judicial investigation.

There are, it is true, a few provisions intended for the relief of aggrieved parties; but these are, from the nature of the case, wholly inadequate. Newspaper notices of intended proceedings in a great number of cases never can reach parties who may be affected by them; and every application to the commissioners being *ex parte* will be, of course, so shaped as to exclude all suggestion of adverse or conflicting rights.

Nor as I conclude is any door open for ulterior relief when once the property has passed into the hands of the purchaser. This indeed is the peculiar virtue and merit of the act, that it bars all claims of this kind. To whatever extent its efficacy in this respect is neutralized or impaired, to that extent the act itself becomes nullified in its operation; and if there be a general saving of interests, it then becomes only a form—and I think an expensive form—of conveyance, having no substantial advantage over the present method.

There is a striking difference between such a law and those ordinary rules which have been hitherto administered by our Courts of Equity in England and Ireland. These courts only profess to bind interests which are brought under their cognizance—the parties to the suit, or those in *pari jure*. With all their cumbersome machinery and objectionable forms of practice the principle they adopt is so manifestly right that I cannot see how it can be disregarded without violating all settled maxims of jurisprudence.

It may be urged that in Ireland the great emergency of the case justifies the measure;—that Irish estates are so deeply

incumbered, that, as a first step to the improvement of the country, it is necessary to transfer them as quickly as may be from their present nominal owners to new proprietors. It is anticipated, as a necessary and immediate consequence of this change, that a large influx of capital will take place into that country—that there will be a great impetus given to agricultural improvements—that English capitalists and Scotch farmers will unite to develope its resources, and bring it into a like thriving condition with England and Scotland—that an end of this kind is so important that we ought not to criticize too nicely the means of attaining it. Few persons have I think practically considered the steps and processes by which this result is to be worked out. For my own part, the prospect of amendment appears to me about as solid as the common recipe of change of air, or any other simple alterative, to a person in an incurable state of chronic disease.

This opinion is, I am aware, unfashionable. I know the hopes which exist and the prophecies of success with respect to this latest panacea for Irish evils. The soberest and wisest of men seem to partake of the happy delusion. I trust I may be pardoned for suggesting some considerations which prevent me from entertaining these sanguine expectations—these thoughts to which our wishes are the fathers.

Let us take the first step. All the property in Ireland incumbered up to a certain point is to be forced into the market for immediate sale. This must be so. It is competent to any party having a charge on an estate so circumstanced to compel the sale of it without regard to the quantum of interest which he may really have in it or the expectation of benefit from its proceeds. The temptation of costs is alone sufficient to set the proceedings in motion. This reduces the question of sale to one of necessity. I speak from experience. Though you may be the first and largest mortgagee, and may wholly disapprove of a forced sale, you will be helpless in resisting. I have myself argued on behalf of parties so circumstanced upon the impolicy of urging a sale. I was answered—"If we do not move, others will. We can even do more towards preventing undue haste by taking the initiative than if we lay by whilst others are in motion."

The effect, therefore, must be—as indeed the avowed policy

of the Act is—to place at once in the market a large proportion of the Real Property of Ireland at its point of greatest depression—to an extent far beyond the ordinary legitimate demands for property of this kind. But the same law which governs the market for other commodities must apply here. As you overstock, so you diminish the value.

This effect is indeed sufficiently obvious. It is perhaps in accordance with the spirit of the measure, which seems to have in view one only end—a change of ownership by any means and upon any terms. It is a popular impression that such will be the natural effect. We hear in common conversation the remark how wonderfully cheap property in Ireland will soon become. I have heard the current value estimated as likely to fall to eighteen, to fifteen, even to ten years' purchase—even lower than this; and a popular notion of this kind tends in itself to produce its own realization. This depreciation appears to me not unlikely to extend by a natural contagion to English estates—already suffering under heavy depression.

English capitalists are to be tempted with these golden opportunities. They, on the other hand, like all persons ready to turn their money to the best account, will of course bide their time. With an expectation that property may soon be bought at fifteen years' purchase, they will not buy now at twenty. With the firm belief that half Ireland will be open to them, they will not greedily catch at the first offers of less desirable investments, when, with a little patience, they may obtain better. Is it not the fact that at the present time little or no disposition has been shown to embark English money in Ireland? Are not English mortgagees recalling their capital, and generally in vain? As to the few instances in which detached farms have met with purchasers, and which have been greedily caught at by newspapers as evidences of a tendency to investment, they are so rare that their singularity excites attention.

There is no doubt that a point of depreciation will come at which it will attract the cupidity of English customers. But is this process a remedial one? It seems to me a fearful aggravation of existing evils. It brings ruin upon hundreds; it beggars the unfortunate landowner who under happier aus-

pices might have hoped for a remnant out of his shattered estate; it extinguishes the last chance of payment to all but the earliest and most fortunate incumbrancers; it deters all advances upon mortgage, a mode by which in many cases improvements might be effected; it alarms existing incumbrancers, amongst whom the cry is—Sauve qui peut. Every one is hurrying to get paid, and ready to trample under foot all other interests besides his own, in the anxiety to escape from the wreck.

Surely such a common calamity as this cannot be productive of good, except indeed by that wonderful process of a remedial agency, which in the order of Providence turns evil to good, and makes our very curses instruments of blessing. But this is a work of superhuman wisdom, and cannot be the rule by which our measures or conduct ought to be governed. To foresee and deliberately intend such a result, seems to me the sign of a reckless and desperate spirit in legislation.

But even when the change of ownership has taken place, and English speculators have taken possession of the land, is it possible to point out any sufficient guarantee that the work of improvement will commence? Whether it be the corporation of London, or a company of commercial adventurers, or Mr. Jones Lloyd, or Messrs. Rothschild—whoever may be the capitalists embarking their money—I confess I am yet unable to perceive the necessary inevitable connection between such a cause and Irish regeneration as a consequence.

Are all the evils of Ireland concentrated in this single point, that the property is deeply mortgaged? No one who has seen or read of its real condition but knows that this is but one of a legion of evils. Even were it possible to guarantee that the new race of proprietors should all be themselves free from debt, and setting aside the strong probability that the temptation to speculate upon profitable investments will lead, by a simultaneous operation, to borrowing upon mortgage, there still remain all the moral, social and physical difficulties of the Irish question to be surmounted — religious feuds to be quieted—agrarian outrages suppressed—habits of industry to be taught—agricultural skill and scientific improvements to be introduced—the whole external face of the country to be

changed—towards all which no step will in fact have been gained by a mere change in the ownership of the soil.

I put aside as a monstrous and horrible idea the extermination or expatriation of the Celtic race, and the substitution of Saxon blood. Such a fancy may sometimes suggest itself in connection with the transfer of Irish estates to English proprietors, as if the English landlord would commence his work by introducing a new race of tenantry and an improved class of labourers, to the displacement of the present agricultural population of Ireland.

I think it requires no argument to prove the futility of such a scheme, if it could ever be entertained. Whatever is to be done for Ireland must be done with Irish materials, only with a very slight admixture of English or Scotch assistance.

But with only these materials to work upon, I can imagine the difficulties of the new proprietor, rejoicing in his promising investment, and hurrying to take possession of his Irish territory, which is to pay him 7, 8, it may be 10 per cent. Full of zeal in the work of improvement, he penetrates into the wilds of Connaught, and for the first time finds himself upon the summit of an Irish mountain, surveying a vast expanse of bog. I can well conceive the infinite perplexity of the problem which must then suggest itself to his improving mind. Upon the side of the hill he sees a few miserable cabins huddled together, each of them inferior by many degrees to the model pigsties which he hast just built upon his farm in Surrey or Hertfordshire. These are his farm homesteads,—the residences of his tenantry. A troop of these presently surround him.—But why should I proceed,—amusing myself with a picture which has been drawn so often and so well,—the picture of English improvements attempted in Ireland, without a careful study of the subject, and a capacity to cope with a thousand difficulties, of which the want of money is only one, perhaps not the greatest? The end of all such attempts has hitherto been failure, disappointment and disgust, and I know not what ground there is for believing that the rule will be suddenly changed.

I am not, of course, arguing that to open a demand in England for investments in Ireland would not be beneficial to the

latter country. In a moderate and reasonable degree, no doubt, it would be so. Much, however, would depend upon the nature and spirit of such undertakings. If every English purchaser were sure to turn out a wise—liberal—resident landlord, that would undoubtedly be a great blessing to the country. On the other hand, if Ireland is to be made the field for one vast land-jobbing speculation, of which the sole end and aim is to be pecuniary profit to the speculators, that I conceive must lead to a result in an equal degree mischievous. Ireland has already been once parcelled out amongst English adventurers,—and see the fruit.

But there is another class of persons to be tempted by Irish land investments. These are small agricultural capitalists, having from 3000*l.* to 5000*l.* each. These, it is supposed, will readily catch at the golden bait. They are over-rented in England. They will hasten away from the burthens of rates and taxes, and all the sore troubles which are at present harassing English agriculture, to a land which is to be made under their auspices a land of plenty.

One is tempted to smile at the idea. We are to export to Ireland that vast surplus supply of English agricultural capitalists who are now overstocking the English market, having a command of from 3000*l.* to 5000*l.* each.

Shall I stop to calculate the numbers of these expected emigrants?

Even were they to be found in an unlimited quantity, what is the chance of tempting them across the channel? Here and there a single and rare exception may occur, but in general the terrors of Ireland will dismay the most stout-hearted, and I am afraid the aspect of the country would sicken them at the first glance. I think, in a general way, we must abandon the dream of regenerating Ireland either through the agency of commercial speculators or of emigrating agriculturists.

But if these hopes fail, what in the meantime will have been the effect produced by the Incumbered Estates Act? Its operation is to place a vast amount of property *sub hasta*. Pending its sale, there must take place a kind of interregnum. The nominal proprietors will be—many of them already are—dispossessed. The estates will be in the hands of mortgagees; a species of landlordship of all others the least calculated to

promote improvements. A mortgagee has an interest limited to a fixed sum,—any improvement of value beyond this is to him matter of indifference. Even if afraid of loss, he dare not, even if he would, undertake any speculative outlay; and as the nature of his interest admits of no improvement by himself, so it enables him to confer no title by which others can be induced to improve. During this interregnum, everything upon the unfortunate estate must continue in *pejus ruere*.

I have ventured to dwell somewhat at length upon the question of the general policy of this act of parliament, partly because I have had occasion in the course of my practical experience to consider its probable results, and partly because I wish to distinguish carefully its bad from its good points,—for undoubtedly it has some features of good, though not perhaps such as to merit the admiration it has attracted. What people look at and admire in it is the simple, concise and intelligible title which it confers upon purchasers. It cuts the knot of all conveyancing difficulties. It is certain, speedy, and, I suppose, in large transactions, comparatively cheap in its operation.

If these were its only characteristics, it would indeed deserve unqualified praise; only we should lament that it was not extended so as to embrace all property whether incumbered or not, and to enable the solvent as well as the insolvent landowner to avail himself of its provisions.

This simplicity and security of title is undoubtedly, so far as purchasers are concerned, a great good, and it may in a slight degree stimulate the demand for property. There is, I know, an almost superstitious faith in the virtue of a title so acquired, and I doubt whether any property in Ireland is at the present time marketable except through this channel.

But all this points in a different direction. What is wanted is not a partial, temporary, exceptional measure, but one—permanent and general—which shall secure to purchasers not merely the power of acquiring property in a simple and commodious manner, but of transmitting it, upon a resale, in a similar way.

I have stated my objections to the blind and arbitrary nature of the tribunal in whose hands the execution of the law is placed. What is really wanted is a well-arranged system, which, while it offers a perfect guarantee of title to persons

dealing with property, may secure also in a scrupulous manner the inviolability of private rights.

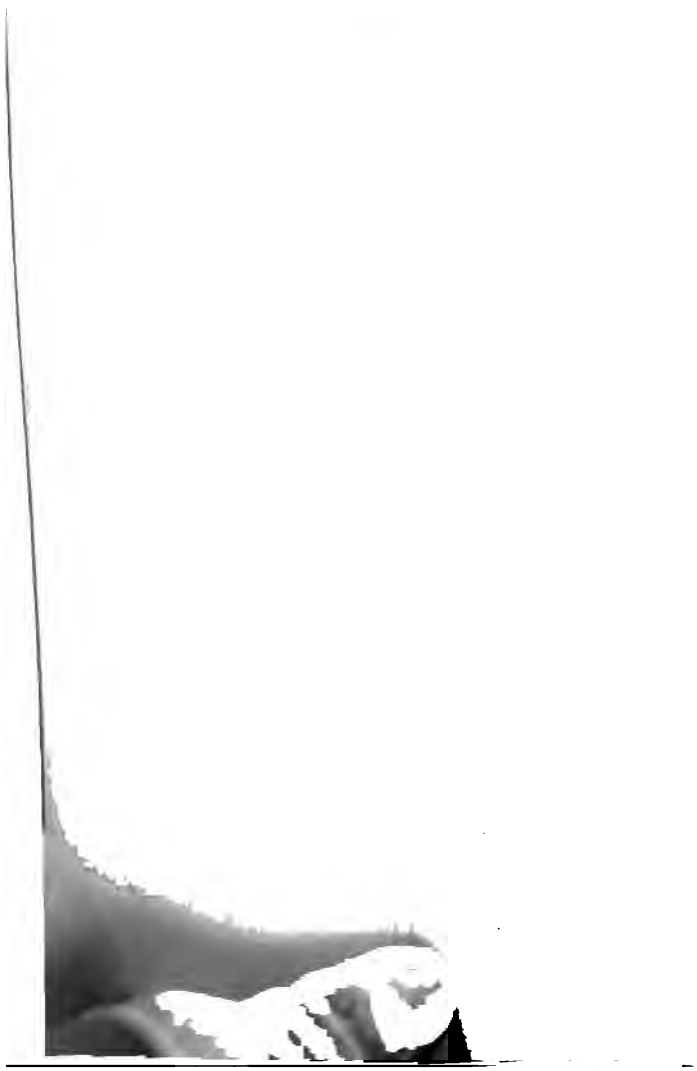
I know no other mode by which these ends can be answered except by a Registry of Titles. Whatever value there may be in such a law as the Incumbered Estates Sale Act would be secured by these means in a far greater degree, for it would embrace all property, under all circumstances, and for all time.

With respect to the plan of such a Registry, I confess I adhere (perhaps with some degree of parental partiality) to my original suggestions. I am aware of the practical difficulty of constructing a scheme which shall comprehend in a general Registry all the various interests in Real Property distinctively, each by itself in its proper place and relation to others. But no Registry can be perfect which fails in this. The value of a Registry of this kind would be so great, if attainable, that I should abandon it with extreme reluctance.

I know that other plans have been proposed which have had for their object the slurring over and evading this difficulty; but they leave in the background the Court of Chancery to supply all their weaknesses and defects. I am satisfied that there is enough constructive skill at the Conveyancing Bar to conceive and perfect a Registry of the most exact and comprehensive kind.

I would only further remark, by way of removing the scruples of some parties, that a Registry of Titles by no means involves necessarily a public disclosure of mortgage transactions. It must be remembered also, that by a *Registry of Titles* I do not mean a *Registration of Deeds*. In any plan of the latter kind it is difficult to avoid such a disclosure. But a Registration of Deeds would, in my opinion, be productive of no real good. Indeed, I think the most perfect scheme for the Registration of Deeds which could be invented would not of itself be found to work any sensible improvement upon our present system.

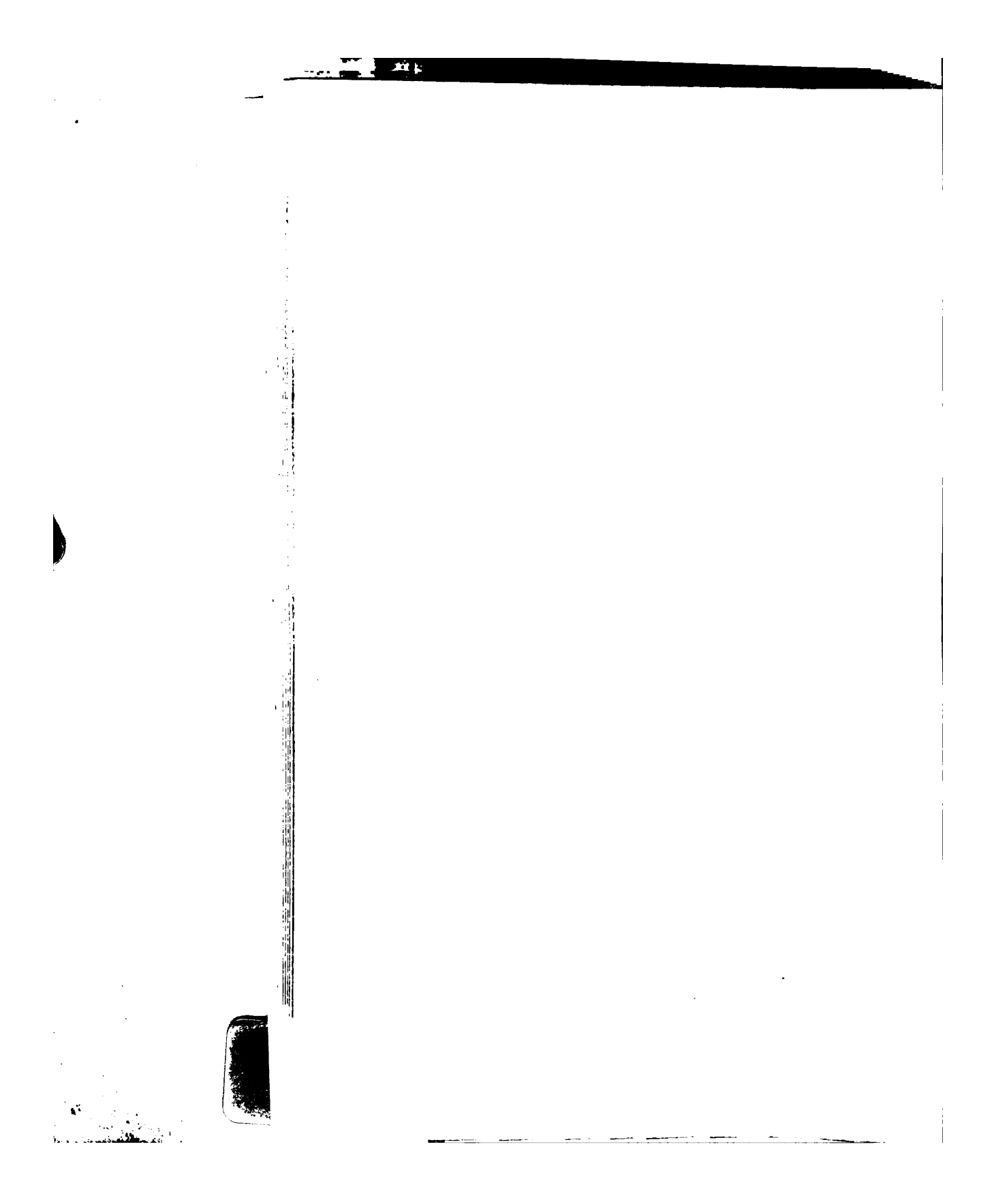
February, 1850.



LORD,

I VENTURE to trouble you with this Letter in the
that the subject of the present state of our Law of
Property will not be without interest to your lord-
It is a point to which recent circumstances have
ally directed public attention, for the change in our
ultural policy naturally leads to a consideration of
one amongst the many burthens under which
property suffers. Without presuming to claim for
an authority which I am fully sensible can only
ceeded to those who have attained to eminence in
higher branch of my profession, I cannot but think
members of my own class are capable of forming a
ct judgment as to results and principles, and that in
own case a professional practice of some extent and
years standing has given me an opportunity of form-
an opinion upon the general effect of the law as now
peration.

Indeed in some respects we are better able to under-
nd, because we see more closely and clearly, the work-
of the system. We are in immediate communication
h our clients—we know their difficulties better far than
mere theoretical conveyancer, who devotes himself to



My Lord,

I venture to trouble you with this Letter in the belief that the subject of the present state of our Law of Real Property will not be without interest to your lordship. It is a point to which recent circumstances have generally directed public attention, for the change in our agricultural policy naturally leads to a consideration of this as one amongst the many burthens under which landed property suffers. Without presuming to claim for myself an authority which I am fully sensible can only be conceded to those who have attained to eminence in the higher branch of my profession, I cannot but think that members of my own class are capable of forming a correct judgment as to results and principles, and that in my own case a professional practice of some extent and some years standing has given me an opportunity of forming an opinion upon the general effect of the law as now in operation.

Indeed in some respects we are better able to understand, because we see more closely and clearly, the workings of the system. We are in immediate communication with our clients—we know their difficulties better far than the mere theoretical conveyancer, who devotes himself to

the dissection of a title or studies the anatomy of a deed with little regard to the sufferings of which he is perhaps the unconscious instrument.

But the distresses of clients come close home to us. Whilst they are enduring the suspense of an investigation of title pending the completion of a purchase, or the settlement of a loan, we are their every-day bosom confidants, —frequently the victims of their discontent. At all times we stand before them as claimants for bills of costs, the mystery of which is of course as unintelligible as a physician's prescription. It would be hopeless to attempt to enlighten the understanding of a dissatisfied client upon the necessity for getting in outstanding terms, procuring deeds of covenant to produce title deeds, tracing a legal estate, or the like. All which he can possibly know of the matter is the amount of delay and expense to which he is in course of being subjected, and for which he perhaps very unjustly holds us chargeable.

There can be no doubt therefore that we have a favourable opportunity of learning at least the nature of the evil and its magnitude,—and this is an advantage. For I cannot but think that those eminent persons whose counsel has hitherto been sought for devising remedies have undervalued the malignity of the disease, and so rather have wasted their learning and ingenuity in contriving palliatives for symptoms, than applied themselves to the seat and source of the complaint.

It would be extremely unbecoming in me to treat the labours of those distinguished men with the least disrespect. But the result and final effect of them has now become matter of experience, and the public voice proclaims that the measures which have followed their recommendations have not in fact alleviated in any perceptible degree the evils so loudly complained of. The professional practitioner is able to recognize the utility and value of some if not all of them; but the uninitiated part of the community are still waiting and asking, and

beginning to clamour for some fruits of the promised reform.

It is now many years since the Commissioners of the Law of Real Property closed their inquiries, having, as it was supposed, effected everything which could be effected in the way of investigation, and recommended everything which could be recommended in the way of amendment. Some of their most important proposals however yet remain untried.

Some of their suggestions have been adopted. Certain ceremonies in the mode of barring entails, and effecting the transfer of the interests of married women by fines and recoveries have been abolished; and other forms simpler and less expensive have been substituted. The period within which dormant claims may be enforced has been abridged—a measure in some respects questionable in point of principle—and which has been found wholly inefficacious as far as it was intended to curtail the difficulty and expense of conveyancing. The law of dower has been altered to the detriment of married women. New forms for the execution of wills have been invented, opening the door for nearly as much difficulty and doubt as the measure was intended to prevent. Other changes of a like kind have been introduced. I have no intention to dwell upon them in detail. As to some, I cannot think that we have gained by the alteration. But as a whole, may it not at once be said, without hesitation and without any charge of presumption, that they have wholly failed of their true object? What the public required (and they were the real parties complaining) was diminution of the inconveniences which they practically felt,—greater certainty and quickness in the transaction of their affairs, and diminished cost.

It will perhaps be said that these salutary effects have been counteracted by an evil principle residing in that branch of the profession of which I am a member,—that we have set ourselves to work to maintain our own interests, by thwarting the natural good tendencies of the measures

to which I have adverted. An imputation of this kind is wholly groundless. We have no desire to tax the community for our exclusive benefit, or to uphold a system injurious to the public for the sake of mere selfish objects.

Some later changes in the law appear to have been founded on the latter assumption. Acts of parliament have been passed grounded on the implied notion that prolixity, and consequent expense, in the preparation of deeds is attributable wholly to an appetite for costs. I disclaim and deny the truth of such an imputation. Probably when the legislature has practised a little more the art of conveyancing, by inventing forms of words to convey particular meanings contrary to their natural import, it will be better able to appreciate the difficulty of the task, and be more disposed to allow that modes of expression long used and approved of, and which have acquired certain and understood meanings and rules of construction cannot and ought not to be roughly thrust aside as mere useless formalisms,—at least, so long as the system to which they belong is suffered to continue. They will learn the danger of attempting to substitute forced and false rules of construction, arbitrarily imposed by act of parliament, for the known and universally understood laws of grammar and common sense.

It is one (and not the least) evil of this kind of legislation, that it misleads people as to the true nature and character of the evil to be contended against. Were I anxious to maintain my profession at the expense of the public, I should desire nothing more heartily than the multiplication of acts of parliament of this kind. They would sow a prolific seed of doubt and litigation. They would create a diversion precisely in that direction which would best suit our own selfish interests. Every session would breed some new code of legal grammar,—some legislative dictionary of legal science, until in a short time we should almost have destroyed the power of words themselves to effectuate their true end, of expressing clear and definite ideas.

Besides this, mere prolixity in deeds is not the evil of which the public complain. It is but one symptom of the evil, and that comparatively slight. The bill of costs indeed does include charges proportioned to the length of deeds, but it includes a great deal more; and in most, if not all cases, the quantum of costs is determined more by the integrity and conscience of the practitioner in the general conduct of business, than by the mere rule of the length of deeds. In fact, the length of deeds would, by any forced legislative attempt to alter their phraseology, become an utterly unimportant item. Any one conversant with the practice of conveyancing knows that, even were their length forced by some legislative act into the compass of a nutshell, the bill of costs may be made to swell in other directions beyond the reach of parliament.* Nor is it at all a fair view to take of the matter, to throw an imputation of this kind upon the legal profession, as if they required the strong arm of law to keep them within the limits of honesty and good conscience in their modes of practice. The question really to be determined between them and the public is, whether, looking to the labour the skill and the responsibility involved in their business, their remuneration is excessive. If the fact be not so, the mere point of the comparative length of deeds is of small importance. The labourer is worthy of his hire; and if not under one form or by one process, then by another the lawyer will receive and be entitled in some way to obtain his fair equivalent. If, however, from want of conscience, we overpay ourselves by our present system, that is a vice not to be cured by act of parliament. If checked at one point, it will break out in another.

"Naturam expellas furcâ tamen usque recurret."

I have ventured to say that no substantial good has

* I have known cases of conveyances in prescribed forms under church building acts, exhibiting all the evils I have mentioned in an aggravated form.

been effected by the Real Property Commissioners, or the measures founded on their suggestions, still less by any subsequent legislation. I mean, of course, to confine this remark to the general results of these measures so far as they have reached the public at large. I do not imagine that the general expense of transactions relating to real property has in any degree been diminished; on the contrary, I think it has increased, and is still increasing, and this by the inevitable force of circumstances. The affairs of men in the present day become extremely complicated, and this complication necessarily entangles the titles to real property. Every succeeding year adds to the evil. Every mortgage, charge, bankruptcy, will, or settlement is the parent of a whole progeny of transactions; and it is matter of experience that titles, especially those which are undergoing frequent changes, as many do, are becoming more and more involved; whilst every step taken in dealing with them becomes attended with a constantly growing expense.

"Ætas parentum pejor avis, tulit
Nos nequiores, mox daturos
Progeniem vitiosiorem."

These circumstances operate in other ways very injuriously. With difficulty and entanglement come uncertainty and insecurity, and, what perhaps is of still more practical mischief, a total impossibility of forming fixed arrangements with regard to time.

Expense, uncertainty and delay, keep pace with each other; and all this is chargeable, not as unobservant persons are apt to think, upon the practitioners themselves, but upon the system of which they are merely the ministers.

My object will be to place before your Lordship the result of my practical experience as to the actual causes of those evils, in the belief that a true perception of them will lead by a necessary process to a perception of their proper remedies.

It would be useless to speculate at the present day

upon abstract theories of real property. Every age regards it under its own peculiar aspect. We may be inclined to favour this or that principle, which may seem to be embodied and represented in any particular system; but practically we are compelled to deal with things as they are. It would be vain and idle to frame schemes of legislation adapted merely to a fictitious state of things;—for instance, in the present utilitarian age, to frame laws applicable to the feudalism of our early history. They would fit us as little as a suit of clothes which we have long outgrown.

As a matter of abstract opinion, I may think that society has lost altogether the true idea of the relation in which the ownership of land stands in the general economy. In a perfectly constructed state, I can imagine territory to be the very nexus and basis of the whole system; that by which the whole community would naturally be bound into one. The feudal system presents us with such an idea under a military form. Something of the same kind we still retain in a very faint degree in the duties, responsibilities and privileges which we annex to the possession and ownership of land. What we may term a natural instinct tends in the same direction, for we usually assign a superior status and dignity to the landed proprietor over the possessor of mere moveable wealth.

I may believe that all this points to a better and more natural order of things, from which we have now widely diverged; one in which the ownership of land would be governed by rules wholly inapplicable to the present age. But to introduce or endeavour to retain them with any good effect, would require the whole structure of society to be re-arranged, and its entire ηθος to be changed.

And all this would belong to a totally different question from that which I am now concerned with. We have fallen upon an utilitarian age. All things about us have assumed that character. If, by maintaining the forms of an obsolete system, we could re-produce the true idea and

sentiment of which they were the expression, it might be worth while to consider well before we cast them off. But they are to us only the shell and the mould—the outer crust from which the inner spirit has departed—and we can no more revivify them than we can raise the dead. I do not mean that we should throw aside the remains of ancient forms with carelessness or irreverence, still less in a spirit of ignorant selfsufficiency. Though they have lost their energy and power, they represent to us, like the bones of the dead, what once was a living and active principle, and we may study them as the comparative anatomist studies the exuviæ and fossil remains of extinct species of animals. But to attempt to retain them, whilst the character of society has undergone an essential change, only involves us in a series of difficulties. We place ourselves in a state of contest against forms which are of a nature foreign and unsuited to us.

These observations refer to the great and fundamental change which has taken place in the aspect with which we have accustomed ourselves to regard real property.

It is no longer a political instrument, binding together the different members of the community. It is a mere object of utility;—that from which we are enabled to derive our daily food, our comforts and luxuries,—which ministers to our ease and enjoyment; it is in short what we term it, *property*, and nothing more. Hence we measure its value by the mere rule of money. We have lost all perception of duties, responsibilities or sentiments connected with its possession. An estate is to us such or such an annual income, convertible into such or such a gross sum of money,—an article which may be sold or mortgaged or let out to tenants. Regarding it in this light, we have no scruple in forcing it from the hands of its owner, by substituting pecuniary compensation. And this view has become so habitual, that it seems almost like affectation to endeavour to apply to it rules drawn from any higher or better principles. The law of primogeniture and the rules of descent are re-

tained, because they have been proved to be convenient. This is however merely accidental. Should an idea prevail to the contrary, they would immediately be swept away.

Now, however we may regard this view of the case,—though we may dislike or disapprove of it,—even though we may desire, as a matter of abstract theory, a recurrence to something better, yet it lies before us as a fact, which practical men must grapple with. It is as impossible to overlook it as any other material thing lying across our path, which hinders our movement;—we must submit to and accommodate ourselves to the external circumstances.

If real property has thus degenerated into a mere thing of utility, legislators must frame their system of law upon corresponding principles. Indeed, the principles themselves have already become rooted and embedded in the system; it is but the forms which require change.

It will be objected to any sweeping alteration, that it will be dangerous, because it will be new. This is no doubt a good reason for proceeding carefully, and well maturing our plans:—and change is in itself an evil. It is wisdom to bear with inconveniences as long as they are tolerable. But then this becomes a question of time and degree. No man hesitates to change his position or plans in life, when he sees ruin before him by persisting as he is. It is for prudence to determine when and under what circumstances an occasion for a change has arisen; but when the duty or necessity is manifest, promptness and decision are but parts of the office of prudence.

This seems to me the only real question in the present case—Are the evils of our present law of such an extent or character as to justify a great change? The general opinion of society will answer the question unhesitatingly in the affirmative. The voice of lawyers themselves is to the contrary. "Stare super antiquas vias" is their maxim and motto. Custom and precedent stand to them in the place of law. They will deprecate all rash and presump-

tious handling of a system which, with all its faults, is somehow or another made to answer its purpose.

Between the two contending parties who shall determine? It seems to me that something may be done towards reconciling the difficulty, if each party were made to understand something more of the other's case:—If landowners could make themselves conversant in a general way with the principles which regulate the tenure and transmission of their estates, and if lawyers could be made more sensitive to the real practical grievances under which the community actually labours. I shall not altogether have failed in my object, if in any degree I shall have been enabled to contribute to either of these results.

Looking then to real property under its present aspect, as a mere useful commodity, a subject of barter and merchandize, what we require is a system of law adapted to such a view of its character; we require therefore,

First.—Security of tenure.

Secondly.—Facility in transferring it from buyer to seller, and from borrower to lender.

Thirdly.—Certainty, in point of time, in all our arrangements respecting it.

Fourthly.—A reasonable, moderate and well-ascertained scale of expense attending our various dealings with it.

In whatsoever degree a system may be found to answer these ends, we may pronounce it suitable to the present exigencies of society. In whatever degree it fails in them, it is vicious and defective.

Let us try our present system by these tests. Does it afford security of tenure?

No doubt persons will be ready hastily to answer in the affirmative; that is, we buy and sell in the full confidence of the general soundness of titles, and we seldom actually see a bonâ fide purchaser or holder of an estate dispossessed.

I will not join issue upon such a question of fact, one

which it would be difficult on either side to prove or disprove. To determine it, it would be necessary to bring together a vast accumulated mass of individual experience, far beyond our reach. Every practical lawyer is probably aware of some case or cases of hardship and loss arising from unsoundness of title, and tending to prove a general state of insecurity; but whether upon the whole the aggregate amount of such individual cases would be sufficient to condemn the system on this ground, must be left, I think, necessarily an undecided point.

But suppose the fact to be that titles to real property are not practically found insecure, shall we attribute the merit to the state of the law? By no means. There is a vis medicatrix here as in every other part of the economy of nature, which is constantly employed in mending the flaws and defects resulting from our own imperfect arrangements. Holders of property are not, it is true, frequently ejected from possession by adverse titles, because there is a curative process in possession itself, which tends to remedy, and does in fact remedy, a vast body of latent weaknesses. Claims become obsolete and die away. A party in possession of his muniments of title is trebly armed against an antagonist who has perhaps little more than a mere suspicion upon which to rest his case. Dormant claims sometimes indeed arise under old instruments, —wills or settlements perhaps; but the evidence of written instruments is in its nature subject to a variety of contingencies. They are shifted from hand to hand, and by degrees are lost and forgotten. At all events, they depend on a perishable material. Were it otherwise,—and could the title deeds of estates for a series of years be resuscitated from their graves, or brought together from the four quarters into which they are dispersed, and could their contents and effect be brought to the notice of all parties having possible interests under them, conceive what a vast amount of litigation and confusion would ensue. There is scarcely a will or a settlement which would not

be the parent of a law-suit. For these are the natural products of a system, depending for its force and effect upon language and modes of expression, in a great degree the mere creation of private fancy. So it is that the security of title, which we vainly attribute to the efficacy of the law, depends really on the mere accident of circumstances. The care with which the owner of a property guards his muniments from public inspection shows that he trusts more to the veil thrown over them as hiding their weakness than to the indemnity which they themselves afford.

But that the system itself affords no guarantee for security of tenure is clear from a very obvious view of the matter. For how comes it that arrangements cannot be made with any certainty?—That they are attended with so much delay and expense?—Ask the conveyancer, who is hesitating about the acceptance of a title, or the solicitor engaged in getting in some outstanding interest. Their answer will be, that the title is full of risk. All kinds of possible claims hang over it, against which nothing but extreme caution and a rigid adherence to rules can guard. But what does all this apprehension and suspicion betray, but inherent weakness and doubt? The symptom is as unmistakeable as a quick pulse and flushed face is of a fever. In fact, after all the pains which the most ingenious conveyancer and the most accurate solicitor can bestow, all which can be attained is but a greater probability of safety.

Let us pass to another point.

Does our present system afford us facility in transmitting real property from party to party?

It would be needless to prove so self-evident a fact as the negative of this question. I say nothing here as to time, for this falls under another head; but the actual difficulty of completing transactions where the parties to deeds are numerous, and have different interests, is very great. It not unfrequently happens that deeds are required to be executed by many parties living at a distance from

each other, and who cannot be brought together. A deed once partly executed is perhaps too important to be trusted to the accidents of ordinary carriage, and must be taken from place to place to procure the requisite signatures. Sometimes it is impossible to adjust the arrangements for payment of money to different parties, as where a purchaser or mortgagee holds an entire sum ready to be handed over upon the complete execution of the requisite deeds, but refuses to part with it piecemeal. Such a case not unfrequently happens, and, but for some under-arrangement, would bring the matter to a stand still. Title deeds frequently lie scattered in various places, and cannot be gathered into one hand. Indeed the whole process is full of inconvenience and difficulty.

But these are evils slight in comparison with those arising from the uncertainty as regards time in all transactions relating to real property.

No man can fix the day when he will enter on his new purchase, or discharge existing liabilities by receiving his purchase or mortgage money. During the suspense, a loss of interest is suffered by one party or the other; but this is but a small item in the catalogue of evils. One transaction generally hinges upon another. Sometimes ruin or safety is the stake at issue upon the mere question of time in the completion of a sale or a mortgage. If all the damage, immediate and consequential, which society suffers from these circumstances could be summed up, it would, I am convinced, reach an alarming amount.

These delays are not unfrequently attributed to the laches of practitioners. It is hastily assumed that they are less diligent or more scrupulous than they should be. But in truth any system which cannot make allowance for defects of this kind must be radically defective, for these are faults of human nature;—nor does it diminish the objection to the system, to throw the odium of the failure upon the negligent or over-scrupulous agent.

But in fact the fault is not in any great degree charge-

arise upon us. If in some instances we occasion delay, in others we take upon ourselves risks beyond the strict obligation of professional duty for the sake of avoiding it. The greater delays occur in transactions of larger moment. In these, recourse is had to the opinions of the higher class of conveyancers,—men of eminence at the bar. Much delay arises here; not that this is attributable to them as a fault, for they are ordinarily men of great industry, learning and quickness. But their numbers are limited, and they are the referees of a whole kingdom. Their chambers are crowded with papers, which fall into arrear from over-pressure.

But in smaller matters, we (I mean solicitors) take on ourselves a vast amount of responsibility, in order to avoid the delay and expense which would result from reference to counsel. Yet this is scarcely reasonable. The guarantee required for the safety of the rich man's title ought not to be greater than for that of the poor man. If it is necessary to protect the large estate by reference to counsel, the poor man's cottage or field ought not to be left to its fate, or trusted to a less skilful class of practitioners; nor, whilst relieving their clients from expense, by diminishing their own profit, should solicitors be compelled to undertake these higher responsibilities.

We have yet to inquire how far the present practice answers as regards its cost. The expense of all transactions respecting real property ought to be reasonable,—that is, proportioned in some degree to the value of the subject-matter;—moderate, that is, affording adequate remuneration to the parties employed, without at the same time being burthensome to the property;—and well ascertained,—because on this partly depends the certain value of estates.

Our system sadly fails in each of these particulars. The expense of a sale or mortgage is indefinite,—governed by no rule,—depending upon a variety of accidents, such as the nature of the title, the character or the conscience of the solicitor employed,—the willingness or unwillingness of a purchaser to complete his contract.

It is not only indefinite, but frequently immoderate, that is, disproportionately large in comparison with the value of the property it relates to; and it is impossible to define its amount beforehand with any degree of certainty; nor does this arise through any assignable fault of the parties employed. The smallest cottage is perhaps the subject of as complicated a title as the largest estate, involving the same amount of labour and skill, and consequent expense. The only item which is governed by a scale is the ad valorem duty on the instrument of conveyance. That in fact the cost of transactions is in a certain degree measured by the value of the property, only proves the general disposition amongst practitioners to adapt themselves to the reason of the case. But this is done by using a widely different course of practice as regards small matters from that observed in larger ones. A multitude of things which are required, and are in fact necessary, for the perfect safety of a title to a large estate, are passed by in dealing with a small one. The value will not bear the outlay. The thing itself would be consumed in establishing the right to it.

This evil increases in magnitude in proportion as properties diminish in value. In cases of large amount it is scarcely perceived. As the scale descends, the proportion of cost advances. When we arrive at that class of transactions (perhaps the most numerous) involving amounts varying from 200*l.* downwards, it becomes excessive. No man can then borrow or buy with any reasonable assurance of being able to estimate his costs within a range of from 5*l.* to 15*l.* per cent. He cannot be safe even within these limits.* A demand for attested copies of deeds, or the deduction of title to some outstanding estate, may involve an expense approaching to, perhaps exceeding, the value of the property itself.

* A Court of Equity would probably not in so small a case enforce the delivery of attested copies, though why it should not, if they are important to the title, I do not know.

That such is not frequently the case is attributable to the forbearance and good conscience of the members of my own profession, not to any merit in the system.

But this diminution of cost is accompanied with a loss of safety and certainty of title; for it arises only by the omission of many requisites essential, if not to the safe holding, at least to the marketability of title. In fact, I doubt whether any small property ever changes hands with a perfectly marketable title, that is, with all its proofs complete. The marketable title is a model of ideal perfection, without a flaw. This perfection may be approached, but is seldom attained; yet it is the marketable title alone which courts will force an unwilling purchaser to take. To reach it, is usually a work of much trouble and expense. It becomes therefore a luxury denied to the buyers and sellers of small properties; yet it is in fact of no less importance to them than to the purchaser of many acres;—or if the poor man can be made safe with a less degree of nicety, and at a less cost, why do we incumber the rich with expensive superfluities?

In order that you may better understand the source of these evils, let me ask your lordship to follow me through the stages of a conveyancing transaction.

I suppose your lordship to have become the purchaser of an estate. You place the affair in the hands of your solicitor, and there you are compelled to leave it. Whatever questions or difficulties may arise your lordship will be unable to facilitate their removal. You will be as little able to judge upon the value of an objection to the title, or the risk incurred in dispensing with its removal, as you would be to prescribe for yourself in some dangerous disease.

This seems to me to be a great evil. Not that I think it desirable that gentlemen should practise law upon themselves any more than it is safe for them to meddle too much with the science of medicine. Yet we do in fact keep family medicine chests in our houses; and we some-

times venture to administer harmless doses without recourse to a physician upon every slight ailment. Exigencies arise where this knowledge is of incalculable value. It is idle to object to this the common proverb, about the danger of a little learning. A little learning, coupled as it sometimes is with much presumption, is indeed dangerous, but the danger lies in the latter quality, not in the former. I cannot think there is danger in gentlemen being acquainted generally with the nature of the tenure by which they hold their estates, and of the transactions in which they may be concerned. But to the multitude the law is a sealed book. No one but the mere professional practitioner can venture to meddle with it. Indeed none but a very select class of lawyers themselves, those only who stand in the highest ranks of the profession, really affect to have a thorough knowledge of it. Even they would no doubt confess that the multitude of conflicting decisions, and the difficulty of construing ill-framed acts of parliament, destroy all confidence and certainty in their opinions.

If this is so as regards educated men, all persons in ordinary life are wholly in the hands of, and under the guidance of, their lawyer.

One practical evil of this state of helpless ignorance is, that no man can safely venture to buy or sell, that is, actually to conclude the terms of a bargain, without having his lawyer at his elbow. If he sells, he enters into a simple contract, laying no restrictions on the purchaser as to what he may require as evidence of title, and he finds himself probably held down to the strict rule of law: plunged into an undefined expense, by being compelled to furnish every thing necessary to a perfectly marketable title. The contract once made, there is no locus penitentiæ; reasonable or unreasonable, he must submit to the requisitions imposed on him. Or if he buys without advice, as men frequently do in auction rooms, unaware of the effect of conditions of sale stipulating against particular objections, he finds himself saddled with a bad or doubtful

title; at any rate debarred of something necessary to make it marketable; and therefore never in a condition to enforce it on an unwilling purchaser. And as he has bought, so must he sell; always having in view in a future contract the disadvantages under which he has himself purchased. And thus the blot is transmitted from each party to his successor.

This evil is becoming one of serious magnitude. The difficulties in which vendors have found themselves involved by the requirements of unwilling or overscrupulous, or unconscientious purchasers or their solicitors, have led them generally to resort to a practice of guarding themselves by conditions of sale. Go into an auction room, and listen to the conditions. The probability is that your lordship will hear read stipulations, not simply binding the purchaser to dispense with superfluous matters of evidence, but others vitally affecting the title itself. Yet there are purchasers there ready to buy in a spirit of blind trust; indeed altogether ignorant of the effect of their agreement. Thus they are led as it were into a snare. And it is a lame apology to say that they contracted with their eyes open,—*Volenti non fit injuria.* The law is in such a state as necessarily to leave them ignorant, helpless, and at the mercy of such accidents. The responsibility for the mischief rests with the law, and not with either party in the transaction. The vendor does but protect himself against heavy expense, which a vicious system would otherwise expose him to; the purchaser buys in a spirit of natural credulity, under a vague reliance upon the safeguards of the law, which however offers him no security or redress.

I return to the point from which I digressed. So soon as the contract is made, the next step will be for the vendor's solicitor to furnish an abstract of the title to the property sold. This is supposed to be an epitome of every thing material to be shown,—an extract of all the substantial parts of the different instruments abbreviated into

a compendious form, so as to present a summary of the whole title, disencumbered of everything not strictly essential.

This document is compiled by the vendor's solicitor; or, as is frequently the case, is copied wholly or partly from some previous abstract. Though it has no effect or operation in itself, it is of great importance, being in fact the groundwork for all the after-conduct of the transaction. Counsel's opinions are given upon these statements of title, and it is generally used for all purposes of reference.

The practice in Ireland somewhat varies from our own. There it is customary to frame a very short statement, serving as a kind of index, and to deliver copies of all the material documents. The latter practice is more accurate, but our own more convenient.

The manner of compiling the abstract of title lies in the sole discretion of the vendor's or mortgagor's solicitor, who may possibly have some object in suppressing or falsifying important parts of the title deeds. Such a case, I should add however seldom happens. Upon his good faith, coupled with such security as an after-examination of the deeds with the abstract may afford, everything depends, for no farther recourse is usually had to the instruments abstracted. Yet nothing is easier than to give a false colour to a title, by a slight and scarcely perceptible omission. This contingency is supposed to be guarded against by the examination of the deeds with the abstract, and in general no doubt this answers the purpose. But if the whole question of the title is so difficult, and its validity a point not to be decided except by counsel of eminence, how can the materiality or immateriality of each particular part of every document be safely determined beforehand by the solicitor's clerk, to whom in fact the business both of compilation and of comparison is entrusted? In fact it cannot be. And so *ex abundanti cautela*, from the necessary incompetency of judging à priori upon the effect of different parts of deeds, an ab-

stract of title comes to be incumbered with a vast deal of superfluous matter. For instance, there is no rule to determine the point of time at which to commence it. So that frequently a series of deeds are set forth which occupy in fact so much waste paper. The contents of other deeds are analyzed with little discrimination. Large portions which frequently have no relevancy to the title are extracted. Thus the abstract becomes faithful indeed, and true it may be, as far as containing all which is material, but unwieldly in bulk and full of useless verbiage.

Now the cost of preparing this document is an important item of professional profit. In large transactions the size of an abstract cannot in the nature of things swell to a very disproportionate extent, but in smaller cases it is otherwise. When the purchase or mortgage money is but a few hundred pounds or less, it is no light question as to what shall be the length of an abstract, which is to cost 10*s.* per sheet in preparation. Here you will see a wide field left to the conscience and discretion of the solicitor. You must not hastily blame him if he errs, as he will needs do, on the side of his own pecuniary interest. You have a system which offers no rule to guide him. You throw on him a task for which he is confessedly incompetent. For to discriminate accurately upon the materiality or immateriality of every part of a title deed, requires as perfect an acquaintance with the science of law, as to form a correct opinion upon its effect. Besides, whilst the mischief of setting forth too much is but the addition of so much cost to the client and profit to the solicitor,—the risk of inserting too little may affect the safety of the transaction.

It is difficult to say what is the average length of abstracts of title. They vary from five sheets of paper, or even less, to 200, and sometimes more. When you consider that the quantum in this case may be only a question of discretion and conscience, and that the amount at stake is wholly immaterial, you will understand the predicament

in which all the smaller class of transactions are placed. A vendor or mortgagor called on to supply an abstract of full dimensions, may in some instances more profitably make the party he is dealing with a present of the property it relates to.

So it comes to pass that vendors of small properties, especially in cases of sales by auction, frequently bind themselves against being required even to deliver an abstract of title, except at the cost of the purchaser; thus withholding from him the only mode by which he can possibly judge as to his safety, or else incumbering him with a burthen, the extent of which he must needs beforehand be wholly ignorant of. Nor is it an answer to say that he buys with his eyes open,—caveat emptor. Men are in fact ignorant of the effect of what they are about, and trust, in the simplicity of their minds, to the protection of the law and the good faith of other parties.

If I may offer a mere guess as to the average length of abstracts of title I should place it at from fifteen to twenty sheets. But this average would not afford a fair specimen from which to judge of a case of morbid development. An abstract containing 100 sheets is by no means an unusual phenomenon, and that without supposing any unfair prolixity in its mode of compilation.

You will inquire how this arises—and here you touch the seat of the disease. To unravel this question will require a cursory examination of the whole subject-matter of the abstract itself.

If a stranger were making such an investigation, his first inquiry would probably be as to the precise nature and qualities of the different instruments abstracted. Without some knowledge of this, he could scarcely form a true idea of the system of which they are the forms.

They may be generally described thus :—

They are evidences, written on paper or parchment, authenticated by certain solemnities, such as signing, sealing,

&c. of the private transactions between individuals relative to their real property. But they claim no higher character than that of mere private documents. They are treated as such by courts of law. They have no value or effect beyond the parties themselves, or their representatives who may be bound by their acts.

The question then arises, how far instruments of this description are suitable modes of effectuating the objects for which they are used.

There are two ways in which deeds are considered as operating.

First.—As evidences of compacts between individuals, defining their mutual rights and engagements with each other. Such are express covenants and undertakings of the like kind.

Secondly.—As means of transferring from party to party the ownership of property.

A little consideration will show your lordship the essential distinction between these two kinds of operation.

The engagement which a party enters into by his covenant is one which may be enforced by law. It is a personal pledge to do or not to do a particular thing. The law gives effect to these engagements through the ordinary courts of judicature.

But the transmutation of ownership of property by the force and operation of a deed is a totally different thing. It confers instantly and by the immediate act new rights and capacities from the giver to the receiver. It is like the actual delivery of goods sold from the buyer to the seller. It reverses the order of the meum and tuum. That which was mine before the signature affixed is your lordship's instantly afterwards, no matter what extent of territory may be comprised within the terms of the deed.

It is with deeds in their latter character that our present question is concerned.

If indeed the ownership of real property and its different changes, be merely a concern affecting the individuals

directly interested, then no valid objection can be made to private deeds in principle as a means of transacting those changes. The question then will resolve itself simply into one of convenience. And I think that I shall have no difficulty in showing to your lordship that, even in this respect, they are unsuitable for the purpose. From their nature they cannot be reduced into a system capable of affording that certainty and security required by considerations of mere private expediency. That the fact is so will, I think, be evident from what I have already said. The existing state of things is a palpable evidence against them.

But I think the objection to them can be carried farther; and that a little consideration of the true character of real property—of its relative position in the general economy of society—of the functions which society is compelled, through its legislature and its courts of law, to assume and fulfil, in determining and preserving the various rights and interests incidental to it, will show that deeds, considered as modes of effecting changes of ownership privately, are inconsistent with sound principle.

It is true that individuals must needs be the parties directly interested in this as in every other kind of property. It is theirs for enjoyment. It is theirs also, (and this we not unfrequently forget,) as a means of fulfilling duties attached to its possession. It would be out of place here to meddle with the moral part of the question. We have to consider it politically. Yet even in this point of view the rights of individuals will be found to be subordinate to a variety of important ends and objects which concern the whole fabric of society. Otherwise, we should admit no other rule to limit the control of individuals over their estates than their mere fancy or caprice.

But the principle is as false—politically as morally—that we are at liberty to do what we will with our own, that is,—whatever our fancy or caprice may suggest. The law recognizes no such licence. It ties up our power of controlling

the disposition of our estates within fixed rules. It prescribes solemnities and forms. It appoints a certain Canon of descent, which individuals cannot alter. In short, the whole system of our Law of Real Property is, as it were, a chart or map laid down determining the lines and limits within which alone the right of individual dominion is recognized.

But when men are permitted to transfer their rights in secret, by symbols not having any stamp of authority, and with formulæ of language subject in a great degree to private caprice or fancy, a dangerous element of uncertainty is introduced. For the true object must be to distinguish and accurately define, as nearly as may be, every man's particular interest, so as to allow as little scope as possible for difference or litigation—

"Interest reipublicæ ut sit finis litium."

Secret transfers defeat this object.

The mischief would be incalculable if they could really be kept from the eye or notice of the world. Happily, they cannot. In a general way, the various ownerships of estates are as notorious as if the deeds by which they are held were published in the Gazette. Every transfer which takes place becomes the common gossip of the neighbourhood. It is as idle and foolish as it must be unavailing, to attempt to conceal these transactions. I do not here refer to the case of mortgages, for these do not come within the rule applicable to beneficial ownerships; I refer only to the latter, as to which a certain degree of notoriety is as impossible to be avoided as it would be impolitic if it were possible. For the notoriety serves many valuable ends. It enables us to determine the relative positions of men in society with tolerable accuracy. It is in some degree a criterion for commercial credit. Even as a mode of charging particular individuals with public offices and functions, and distributing local burthens, we could not dispense with it. Must there not be then a radical defect in the

principle of a system which professes to countenance and encourage the suppression of this knowledge?

Try the question, my lord, in another form. We require for common purposes symbols which shall adequately represent our various rights and interests. Without them, we should be at a loss how to transact our affairs. Abstract rights cannot be brought within our comprehension, still less can they be made a subject for barter, except under some visible and palpable form. They would otherwise be to us as ideas without words, or value without money, or any other immaterial thing without a bodily form capable of expressing it to our senses. But mere possession of property is not with us as with our ancestors sufficient to represent real ownership. In a complicated state like ours, we require a more elaborate mechanism. Title deeds are the instruments we employ for this purpose, and not only effectuate the transmission of rights, but serve as symbols to represent them.

The distinction will be easily understood.

When your lordship purchases an estate you derive your title from the deed by which it is conveyed to you; but the evidences or muniments which are handed to you by the vendor constitute together the symbols which represent his title, as they will, when added to your own deed of conveyance, constitute yours. The mere possession of these instruments is sometimes attended with legal consequences, as in the case of liens for securing money. In this point of view they are as important as the actual conveyance of the estate. No man completes a purchase or mortgage without obtaining possession of them. But their value for this purpose belongs to them in the aggregate. The whole series do but make up one symbol.

Admitting the necessity of symbols of some kind, as visible badges and types to represent the ownership of property, so as to enable us to deal with it for practical purposes, can it be said that private muniments, such as we now use, answer this end?

Their first striking defect is want of simplicity. For consider what a complicated chain of transactions must be put together to make up the sum total of a title. This arises from the very nature of title deeds as mere private acts of individual parties. They work only upon a title already supposed to be existing in the party conveying;—for no man can grant more than he himself has;—and the conveyance to me of an estate will not operate farther than the right of the party conveying. Prolong the chain of conveyances backwards ad infinitum, the same objection will apply; and the foundation rests upon nothing more solid than air, until you superadd to the whole a long course of possession sufficient in itself to bar all adverse claimants.

But title deeds consisting of so many distinct and detached instruments frequently become separated from each other and lost. Then the unity and perfection of the symbol is destroyed, and the title becomes defective, for no man is advised to complete his purchase or pay his mortgage money till he receives all the deeds. There is no mode of guarding against such accidents. To avoid them, parties frequently deposit their muniments in the strong room of their bankers or solicitors. But even here they can have no guarantee for their safe custody. As for themselves, they shift from place to place, from one home to another, leaving their deeds to the mercy of chance.

A fixed and certain place to which access may be had easily, and certainly as the repository or registry of titles, seems to be required, if only to remove this objection.

But again,—in the subdivision of estates, it is necessary for many parties to refer to one chain of deeds as the evidence of their common ownership. Here our present system is wholly at fault. The only contrivance it can offer to meet this defect is a poor substitute in the shape of a personal covenant by one party, to whose custody the keeping of the deeds is entrusted, to preserve and produce

them to the others. This covenant at best does but afford the remedy of an action at law against the party who refuses to fulfil the engagement. In some cases, this covenant is so framed as to run (as it is said) with the land, so as to bind all future parties into whose hands the deeds may come; but an effectual covenant running with the land, requires conditions which are frequently, if not usually, wanting. It must be entered into between parties having in themselves the full legal ownership, or, as it is termed, the legal estate in fee. No party having an inferior title can bind the inheritance in perpetuity. But important title deeds are frequently in the hands of parties not qualified to enter into such a covenant. Its operation in such cases therefore is restricted simply to the covenantor and his immediate representatives. As soon as these pass away, the remedy is lost, and the title becomes defective for want of any means of enforcing the production of deeds.

The sub-division of estates is rapidly increasing. Whole towns are rising into existence under circumstances of this kind. They are held upon what are called building leases. Such are the Grosvenor and Bedford properties in and about London. In these cases it is customary for the owner of the soil to grant leases for certain long periods, with a stipulation that he shall not be required to go into evidence of his title,—a stipulation which runs through every after-disposition of the leasehold interest. These lessees, and all parties claiming under them, take their titles upon a blind confidence, trusting to the bona fides of their lessor, or to the notoriety of his title; for as to the warranty or covenants for title contained in such leases no real value or security is attached to them.

As a practical fact, this is not without its utility, for it exhibits an instance of parties agreeing to accept a single instrument, the lease creating their term, as the only symbol of their title, rejecting thus as merely superfluous all the antecedent deeds. Practically, we know that property held in this manner is usually as safe as any other.

I have dwelt upon this point at some length, because I feel assured that a fundamental defect in our system lies here;—that deeds, as mere private acts, are inadequate symbols to represent the ownership of real property; and that we require for such a purpose something which shall be in itself more simple and safe from casualty.

I have supposed the case of a stranger endeavouring to make himself acquainted with the nature of a title as set out on an abstract. It is probable that the next point which will strike him will be the general character of the abstract itself. It is a history of transactions, reaching back for a considerable period,—the point of commencement probably being about sixty years ago. From this point downwards every circumstance which has occurred in any way affecting the property is recorded. The nature and extent of these transactions is necessarily undefined. Every year may have brought with it some change—a sale, or mortgage, or settlenent, or will. The purchaser must be made acquainted with them all to enable him to judge how far he will be safe, and to secure the full means of protecting himself in the enjoyment of the property purchased. He is charged with the responsibility of seeing to this himself. The rule is—caveat emptor. If by want of vigilance or care he suffers loss he will be without redress.

The reason why it is necessary to carry the history of titles so far back is, because we have no other criterion of ownership to judge by but possession.

This is the basis on which the whole effect of deeds really rests. The mere parchment and wax, with its writing and signatures, is an empty form, except as accompanying possession. It is said that in Ireland the titles to the forfeited estates are deduced and transmitted with exact regularity. The value of such documents in a court of law will enable us to determine the general question of the value of title deeds, except as evidences accompanying possession.

The groundwork of such a principle is no doubt sound. As between contending claimants it is reasonable to lean in favour of the party in possession. And after a certain lapse of time possession may, without injustice, confer or establish as rightful an ownership which may have commenced in wrong. Greater hardship and injustice may be done by dispossessing the family or successors of some wrongful usurper of property, than by extinguishing the dormant and perhaps forgotten claims of the otherwise rightful proprietor.

But the question with which we are concerned is not as to possession as a principle which should govern titles as between contending claimants, but as to possession viewed as a criterion of ownership, enabling us as by a visible badge or sign to guide ourselves in our transactions respecting property.

In an age which discouraged alienation, and regarded the ownership of land in so different a light from ourselves, it would have been unreasonable to expect any contrivances for facilitating its transfer. Possession was then a sufficient index to titles, that is, possession explained and defined by written deeds which accompanied its different changes. It was no part of the policy of the law to contrive schemes for enabling the holders of estates to sell or mortgage with facility. Indeed the simplicity of the then state of society scarcely required any other machinery. Look at a bundle of old deeds and see how few and simple their dealings were. The little intercourse which took place between men,—the absence of turnpikes and railroads,—and a commercial system as yet undeveloped, kept them within the circle of their own homes, and confined their transactions within narrow limits. In such a state of things, the knowledge which each locality would necessarily have of the circumstances affecting the property in its own neighbourhood would supply the want of any other more exact record. The direct territorial relation-

ship to which the different parts and members of society stood to each other contributed to the same result.

But a great change has come over us.

Tempora mutantur, we can scarcely add *nos mutamur in illis*. We have not yet adapted ourselves to the change. We still adhere to the rule of making possession the only visible criterion by which to determine titles, not considering its inadequacy for such a purpose.

Try the question practically.—An abstract is a history purporting on its face to describe the various changes of possession which the property it relates to has undergone during a certain period of time. It does this simply by setting forth the substance and effect of the deeds which have been made respecting it. It tells us, for instance, that in the year 1790 John Thompson, by a particular deed, conveyed such a property to Peter Stiles, that Peter Stiles by another deed conveyed it to John Johnson, and so downwards. But throughout the whole we look in vain for any evidence of that which is the pith and marrow of the whole, the accompanying possession. It would be hopeless to expect such evidence. The rapid changes of society efface it, and the nature of our transactions is such that even where we have it we cannot refer to it as a safe guide.

But possession, it will be said, must be presumed to have coincided with the successive changes of interest described by the title deeds. No doubt in ordinary cases the fact is so. We have not advanced so far in the arts of fraud as to set up a manufacture of supposititious deeds, though I believe such cases have occurred. Indeed such a thing would be extremely difficult of accomplishment. But falsehood lies as much in the *suppressio veri* as the *suggestio falsi*, and no one will venture to say that fraud of this kind is not of frequent occurrence. It is indeed one of the standing complaints against our system, that it offers for it such temptation and such opportunity.

Is not the alarm and suspicion with which titles are

regarded an evidence of this? And does it not work out in the palpable form of that delay, expense and uncertainty which I have described as attending all our transactions?

It seems to me as if an absolute necessity was before us of devising some other criterion to determine the rights over real property. In the present intricate state of affairs possession has ceased to be an index of ownership sufficiently certain to guide us, and private title deeds (which are in fact merely accessories of the system of which possession is the groundwork) have become therefore necessarily unserviceable. For signs have lost their value when they have lost their power of signification.

I proceed to consider the details of an abstract;—and here the first question which will occur to a stranger will be the length of time for which it is carried back. He has no doubt heard of a statute called the Statute of Limitations, restricting the period for recovering dormant interests in property to twenty years, and he will imagine that any earlier deduction of its history must be superfluous.

This is a popular notion; but it is founded on a mistaken idea of the object and effect of the Statute of Limitations. Its object was not to give to a certain length of possession the rights of absolute ownership, for this would have been manifestly inconsistent with the various interests in land, which the law permits to be created, covering long spaces of time. The law did not intend that the lessee for twenty-one years should, when twenty years of his term were expired, oust his landlord, or that a tenant for life, who should happen to survive that peried, should displace the interests of remainder-men and reversioners. This would be an absurdity. It simply meant to bar persons sleeping upon their rights from pursuing their remedy to recover them after such a length of what is termed adverse possession.

Previous to the late act, sixty years was the limit fixed for enforcing claims to real property; and before this, a still more remote date, commonly called the time of legal

memory, being in fact the return of Richard the First from the Crusades.

The policy of our law has thus been gradually to abridge the time for establishing latent rights to real property. I confess I cannot reconcile to myself the summary extinguishment which the late law has effected. It seems to me not framed with sufficient regard to considerations of justice. Provisions are indeed made for preserving the rights of parties under disability (as it is termed), that is, under coverture, or infancy, or lunacy, or absence abroad. But even these are extinct after a lapse of forty years. No doubt the intention of the legislature was to assist the simplification of titles. It looked more on the side of general policy than to the rights of individuals; and if the effect had really been to facilitate our transactions respecting property, the force of the objection would have been greatly diminished; but practically I do not imagine that it has relieved in any perceptible degree the difficulties of effectuating transfers, or diminished the expense. It has not practically shortened an abstract, nor (speaking in a general way) removed any of the points of doubt requiring to be elucidated.

For it is obvious, as I have already remarked, that a party may have been in bare possession of an estate for a longer term than twenty or even sixty years, and yet may have held it rightfully in respect of some merely terminable interest. He may have been tenant for life or years. Even though the property may have undergone changes importing on their face the existence of a more durable tenure, the case may not be altered;—for a tenant for life may execute a deed of conveyance purporting to convey an estate in fee simple, yet nothing will pass but an interest co-extensive with the right of the grantor.

So that, although the abridgment of the period for the limitation of actions and suits relating to real property has tended, in some instances, to cure radical defects of title, by excluding adverse claimants, its effect has stopped here.

For it is the business of the conveyancer, as nearly as may be, to attain perfect security for his client. His invention is taxed to imagine all the possible risks against which it is his duty to guard. He therefore requires, before he can pronounce a title safe, that such a series of dealings with the property shall be shown as will prove it (not morally impossible, for that is a point unattainable), but unlikely in the highest degree that there should be any outstanding adverse interests; nor is he at all times contented even with sixty years. Should a deed be noticed or referred to, suggesting the possibility of a remote claim yet unextinguished, he requires its production, if only to satisfy himself of the negative. I can imagine cases where, in spite of the provisions of late acts of parliament, titles may be preserved springing from a very remote date. The Real Property Commissioners mention the case of an entail rising into existence, the origin of which was in the reign of Elizabeth. I can imagine such a case under the existing state of the law.

Now, in dealing with real property, we ask for absolute and certain safety; we cannot be contented with less than this. The labour and expense of which we complain is incurred in the effort to reach it. After all, we may be disappointed, and fail. Remote entails, unextinguished terms, equities kept alive by recognition within the legal period, are contingencies to which titles apparently the most safe may be subject; so that, although twenty years is sufficient by the operation of the Statute of Limitations to bar adverse claimants, five times that period may not be enough to cover the whole space of time which may be material.

This leads to a consideration of what I think it important to keep in view,—the general principles which ought to govern us in respect of the creation of remote future interests affecting real property.

Each generation of men as it comes into esse has a qualified dominion over the rights of territorial ownership.

Our rights in this respect have superseded those of our ancestors, and those of our posterity will in like manner supersede ours. We have indeed a right to the possession and enjoyment, and we have a right to a certain extent, and under certain conditions, to mould and define the order of succession in which our property shall descend in futuro. The law, which is supposed to be a perpetual rule of government common to all ages, defines in general this order of succession by rules founded, or supposed to be founded, on principles of immutable truth, at least of such unvarying expediency as to be of equal force. The law of primogeniture, for instance, with us directs the succession of the first-born male to the paternal inheritance. Though the rule itself may vary in different communities, each assumes its own to be the true one. These certain and universal rules governing the succession of estates are widely different from mere exercises of individual will or fancy. The power under which a party creates a remote remainder, or limits a term of years of unreasonable length, has no kind of resemblance to the power by which the law governs the descent of property. The one expresses the wisdom of society in its corporate capacity, drawn from some higher fountain of truth, and irrespective of individuals or generations; the other expresses the spirit of individual wilfulness and licence.

I will endeavour to point out to your lordship some of the practical evils which have resulted from a disregard of these (as it seems to me self-evident) principles.

One of the most remarkable features in our law of real property is the doctrine of remainders, a term which, with a little explanation, I hope to make intelligible to you.

Property is commonly held by parties who have only terminable interests, as for life or years. On the determination of those interests as they successively pass away, other new interests arise; as, for instance, on the death of a tenant for life under an ordinary settlement, the eldest son usually follows as tenant in tail. On the failure of

that entail, another and again another may be appointed to succeed. This continuous chain of succession of one terminable interest after another is expressed by the term remainder. So we say a man is tenant for life with remainder to his eldest son in tail, with remainder over to other parties in like succession. These remainders, or successive interests, may be created according to the will or fancy of the party who has in himself the fee or fee simple, that is, the full and complete dominion over the inheritance.

The law, wisely foreseeing the mischief of permitting men to indulge an uncontrolled liberty in directing the future course of succession to their estates, imposed some conditions on its exercise. Indeed, without such limitations, an absolute and unrestrained license in this particular would have involved consequences, the mischief of which would have been scarcely capable of estimation. Your lordship will readily perceive how injuriously the title to land would be affected, if we were obliged to deduce the origin of existing rights to the acts of remote ancestors;—and as with ourselves, so also will it be with our successors.

One of the rules intended to check this evil is, that a fee shall not be limited upon a fee, or, in less technical words, that when the owner of the inheritance has once alienated or disposed of it fully and completely, he cannot superadd any limitation thereupon. Thus a grant of an estate to a man and his heirs (which is the form for passing the inheritance in fee simple), completely disposes of all which is in the power of the grantor. He cannot then add a condition, that upon the failure of the heirs of the grantee, it shall pass away to a third party.

And as a part of this rule, the law, according to its original principle, forbids any contingent provisions to be introduced for shifting and changing the ownership of the fee from one party to another, except within certain limits. So it will not allow a man to grant an estate to another in

fee, and then to add a condition that upon the failure of his lineal issue, it shall pass away into some new channel. For in such a case the failure of the line of issue is an event which may be indefinitely remote, and it would be unreasonable and absurd in the highest degree at the present point of time to permit a man to order the course of things which is to take place it may be 500 years hence.

Were such a license permitted, the titles to property would fall into inextricable confusion, and no man could feel assured of the safety of his present tenure.

There are, however, limits within which this rule is subject to exceptions. The exigencies of families require that some latitude should be permitted to individuals in moulding and directing the succession of their property. Without troubling your lordship with nice distinctions, the practical rule which the law adopts to meet this necessity seems to me to reconcile as nearly as can be public policy and private convenience. It permits an owner, in ordering the course of its succession, to impose conditions for changing the inheritance from one party to another, provided the event which is to determine the change is such as must necessarily happen during a life or lives in being, and twenty-one years after. I have already suggested a case where the law does not allow such a transposition of interests, as where a man, after limiting the fee simple to one party, adds a condition, that upon the failure indefinitely of his lineal issue, it shall pass to a third. There the indefinite remoteness of the event makes the limitation over void in law. But if you confine the condition to a failure of the line of issue, either during your life or the lives of any number of living persons whom you choose to name, and twenty-one years afterwards, there the law will support such a limitation.

The advantages of such a rule are obvious.

A man's ownership and right of disposition over his property is respective of two objects—his own personal use and enjoyment, and the interests of his successors

As regards the latter, it is reasonable that a man should have a power of controlling the disposition of his estate with reference to the circumstances of his family. He is thus enabled to provide for many necessary contingencies. The characters of his children, their position in life, and a variety of other considerations, govern his views in the distribution of his property. A due regard to these belongs in fact to the parental office.

Nor is it possible to limit this to the case of parents and children. There are relationships adopted as well as natural. A party who places himself in loco parentis assumes the character and at the same time the duties and responsibilities of such a situation.

And something also must be left for the indulgence of private fancy. The liberty of making an eccentric disposition of property is perhaps one of the charms of its possession. But this seems rather to be a subject for toleration than encouragement; and the rule of law which I have mentioned clearly recognizes the necessity of confining it within reasonable limits.

The period of a life or lives in being covers the whole existence of all living persons, of whose characters, circumstances or prospects a party in esse can have any cognizance. The extra term of twenty-one years enables him to provide further for a whole minority. Beyond this, any attempt to direct the channels which property shall take, must be the work of blind chance or wanton caprice.

But our system of law does not adhere to these its own recognized principles. In two important points we seem wholly to have abandoned them. For we permit entails to be created, stretching possibly to an indefinite point of time. We also permit the existence of terms of years of preposterous length. And as we allow remainders to be limited on the determination of these interests, we give rise to estates which, when they come into esse, must date their origin from an indefinitely remote point of time.

These deviations from sound principle practically affect, in a very obvious manner, the question immediately before us, for they touch the origin of titles.

I trust that your lordship will not think me tedious in dwelling on these two points a little more in detail.

The language in which a modern entail is created is by a gift or grant to a person and the heirs of his body; words of qualification may be added, limiting the right of inheritance to a particular species of issue: as to males in exclusion of females, or to the issue of a particular marriage. These varieties of entail are distinguished by appropriate terms, as tail male, or special tail. The effect of such a limitation is to create an inheritable interest, descendible in perpetuity through the whole stream of issue,—each one as he comes into esse having rather the character of a tenant for life, and claiming immediately and directly, not through the ancestor to whom he succeeds, but, as it is said, per formam doni, that is, through the operation of the original gift or grant creating the entail. This original gift or grant becomes therefore the root or stock of the title to such an entail down to the remotest generation.

The history of our law shows that entails have undergone important changes.

The original common law rule was, that such language as now creates an ordinary entail created what was termed a conditional fee; that is, a fee,—or fee simple (to use a more accurate term)—conditional upon the event of the donee having issue born. Upon the birth of such issue, he became absolutely entitled, by the fulfilment of the condition, to the full and absolute ownership of the inheritance. Nor did such a rule at all militate against the general policy of the law, which then tended to restrain alienation, for the power of alienation was fettered by feudal restrictions; the power of devising by will did not exist, and the rights of creditors over real property were unknown.

As these restrictions began to be relaxed, the spirit of

feudalism endeavoured to obstruct the progress of innovation, and produced an important change in the law by a statute called the statute De Donis.* By this statute, the limitation of an estate to a party and the heirs of his body was made no longer to create a fee simple conditional, but that continuous chain of interests in the whole stream of lineal issue which I have described.

The intention of the statute was to prevent any diminution of the greatness of family estates, and to make each succeeding representative of the family dignity independent of the acts of his predecessors.

It contemplated the absolute extinction of all power of alienation beyond the mere duration of life of each succeeding tenant in tail; an intention, however, which it was unable to carry into effect, for our courts of law very soon afterwards sanctioned a process called a common recovery, by which a tenant in tail became capable of barring the entail, and destroying the rights of his successors.

I need not trouble your lordship with a description of the mysterious process of a common recovery. It was indeed a mere form, adopted for the purpose of evading some of the effects of an impolitic law; an end better attained by the form we now use, of a disentailing deed enrolled. But the effect of a common recovery (and so, in like manner of its present substitute, the disentailing deed) was not to restore the law to its original state. It did not replace the simplicity of the common law principle. It merely provided a form by which a tenant in tail was capable of enlarging his interest into an absolute fee simple. When the recovery was suffered, the entail was destroyed; —then his ownership of the inheritance became complete, transmissible and descendible according to the ordinary rules of law. But all this was merely accidental. The tenant in tail might or he might not avail himself of his power; he might or he might not succeed in perfectly accomplishing his object; for the requisite forms were

* 13th Edward the 1st.

complicated, and the operation not unfrequently failed for want of attention to some important nicety.

The only alteration made in the system by our present law is a greater simplicity and less expensiveness of form. Still the inherent vice continues, that the remedy provided for an admitted evil is merely accidental. Still the process is accompanied by forms which may be defectively complied with. The original character of the entail as created by the statute De Donis is unchanged.

There appear to me three important points in which the statutable entail sinned against fundamental principles.

It first attempted to create an interest in land beyond the power of alienation. This attempt has been frustrated, and cannot therefore any longer be charged against it as a matter of present offence.

But secondly; it created new canons of descent at variance with those universal rules which the law had in its wisdom prescribed, and which, if only on account of their universality, are of paramount use. For every entail became a new canon of descent, directing the succession of the entailed property in a particular line of issue; sometimes excluding males and sometimes females from all right of inheritance; sometimes confining it to the issue of a particular marriage. The instrument containing the original gift or grant creating the entail became therefore *quoad hoc* a new law, but one without any of the proper attributes of law: not imposed by any competent authority, not sufficiently authenticated, and not recorded, so as to serve as a certain and known rule in perpetuity for the parties affected by it.

Its third great sin was, that it gave rise to interests in land, deriving their origin from an indefinitely remote point of time, and taking effect as remainders after the determination of the entail.

The doctrine of remainders is, I think, a curious instance of the fallacy upon which practical systems of vast importance are sometimes built.

The highest interest in law which a party can be said to

have in real property is called a fee-simple—a term importing the absolute unqualified ownership. Every interest less than this, as for life or years, is termed a particular estate, that is, it is *particula*, a small part or fraction of the entirety. The estate tail is considered of the latter kind. Now every estate in fee-simple is considered as an infinite quantity, capable of being sub-divided and extended into any number of particular estates. It is the integer which is metaphysically the necessary subject of infinite divisibility. Ten thousand successive terms of ten thousand years each, an equal number of estates for life, an accumulation of entails exhausting all the posterities of all living men, may be conceived as capable of being carved out of the fee-simple, still leaving an inexhaustible remainder in fee.

Thus, by a remarkable instance of what may be termed legal nominalism, a name has been converted into a thing. It has assumed all the character and attributes of an actual entity, instead of being what it really is, a mere mode of expression, defining the qualities incidental to the ordinary kind of unqualified ownership.

Built upon this theory is our law of remainders. The estate tail being but a particula of the integer quantity, the fee-simple,—there remains a quantity still infinite, subject to the disposition of the owner. Out of this he carves any number of successive remainders as he pleases, each one made to take effect on the determination of its immediate predecessor.

Thus estates are made to come into effect on the failure, at any indefinitely remote point of time, of particular lines of issue. The same deed or will which appoints a special canon of descent to govern the inheritance in perpetuity, purports also to direct the future destination of the estate to the end of time, and, as each line of issue drops away, to divert it into any number of new channels which the caprice of a proprietor may invent.

Your lordship will no doubt see how importantly these principles affect the deduction of titles. It is true that

courts of equity will not allow the mere suggestion of a possibly unbarred entail as an objection to complete a purchase. But such a possibility affects the conveyancer's investigation, and imposes on all vendors the necessity of exhibiting such a course of dealing with the estate sold, as will exclude all reasonable supposition of such a risk.

The cure required for this evil appears to me sufficiently simple and obvious. It is not sufficient to invent forms by which a remedy may be applied of an accidental and precarious nature, for such in fact is the true character of our modern disentailing deed. A recurrence to the simplicity of the common law rule would answer every purpose. Every entail may be made ipso facto to be enlarged into an absolute estate in fee-simple upon the fulfilment of the common law condition—the birth of issue in tail. Even if no other improvement were made in our system, this seems to me as much required by reason and common sense as by considerations of general expediency.

I come to the question of long terms of years. I have noticed them as partaking of the same objectionable character as entails. Their effect will, I think, be found still more mischievous. Entails are by no means of such frequent occurrence, but terms of years of one kind or another infect all titles.

Every term of years is necessarily terminable, and its determination necessarily gives effect to some new interest waiting in expectancy for that event. What can be said in defence of so monstrous an absurdity as the licence assumed by individuals and permitted under our present system of law of limiting property for terms of 500, 1000, nay, 10,000 years, and then chalking out or purporting to chalk out some other course or channel by way of remainder which it shall take upon the expiration of that period. The mere effect of carving out such a portion of the inheritance, leaving the residue to take effect by way of reversion, without any express limitation of a remainder, produces

the same result. An interest is created which is to continue for such a time. At the expiration of that time a new title is to arise, whose origin must date back to the same point as the creation of the term on which it depends.

The practice is in daily use. If a mortgage is required, it is convenient to limit a term of 1000 years to the mortgagee by way of security. If portions are to be provided for younger children, recourse is had to the same extravagant machinery. Not unfrequently two or three successive terms, each probably of 1000 years duration, are created by one and the same instrument, the one to take effect ostensibly upon the determination of the other.

All this it will be said is merely a fiction, a contrivance of law ingeniously invented by conveyancers to serve purposes of convenience.

That it is mere fiction, in a certain sense, is obvious enough. We give existence to titles and interests in property, whose origin must always be referred back to the deed which creates them. But long before their natural efflux, the parchment on which the words are inscribed will have become dust; and our posterity a thousand years hence will be as little disposed to search for the records of the transaction as we are now inquisitive as to the muniments of our Saxon ancestors.

But although they have thus much of fiction in them, yet their effects are practical, and the mischiefs they produce most substantial and real.

It is true terms of years, such as I have described, are usually mere forms for effecting securities for money, and ordinarily they soon sink into and become identified with the title to the inheritance. But sometimes they become actually subsisting independent interests. They may be created in this manner at first. It is by no means an unusual thing to find property held by way of beneficial ownership for terms of such length. And terms created merely to serve as securities for money, if the property is required to be sold for the purpose of raising the money, are detached

from the inheritance. The property sold by virtue of such securities becomes held under what is called a leasehold title.

There are besides a species of leasehold interests now becoming very common, particularly in growing towns, which are terms of years, renewable—sometimes for a limited period, sometimes for ever. An owner of land, for instance, grants a lease, say for 99 years, either absolute, or determinable on the dropping of a life or lives named in the lease. Then he superadds a covenant, intended to have the effect of binding himself and all future parties to whom the inheritance may come in succession, whensoever the terms so granted may drop or expire, and so on from time to time, to renew the original lease. Thus virtually creating a leasehold perpetuity. I know that grave doubts have been expressed as to the validity of this kind of leases; but I know also in practice large masses of property held under them, and that they are in daily use.

It is said that terms of years could not by the early law be created for a longer period than forty years. They represented in fact merely the interest of that class of persons now known as the occupying farmer or tenant. There was an actual relationship of tenure between the tenant for years and the owner of the freehold, marking clearly their relative positions as lord and vassal, or, as we should now express it, as landlord and tenant. The services which were rendered in kind, or commuted for money, kept up a visible badge of this relationship. As a consequence of this view of their original character, the law regards the estate for years as of vastly less dignity and value than the freehold. It treats them as insignificant rights, scarcely deserving a place in the rank of beneficial interests in the soil. They are mere personalty, descendible and divisible amongst next of kin; they are assets in the hands of an executor; they are liable to be taken in execution under writs of fieri facias, as ordinary goods and chattels; they are chargeable with probate and legacy

duty; in all these respects they differ toto cœlo from freehold interests of inheritance. So that if I should happen to purchase a property held under these diverse tenures, intermixed as I have frequently known in an inconvenient manner, though as regards duration of interest I may probably think it immaterial whether my title is held in perpetuity or for 1000 years, yet the results may be extremely awkward. For instance, should I happen to die intestate my heir-at-law may be entitled to succeed to the dining-room, whilst the kitchen and larder may pass to my executor and next of kin—the stabling and offices may be made liable to the claims of creditors of one class, the house and pleasure grounds to the claims of another.

It will be said, the law surely cannot be careless or indifferent as to the creation of interests in land differing so widely from the principles which she lays down and adheres to as those of true and sound policy. She cannot be unconcerned in the question, whether the rule of primogeniture or that of equal partibility shall govern the descent. The proposition seems absurd. One rule or the other is the true one. It cannot be a matter of indifferent choice between either.

Yet the license thus given to individuals to create long terms of years practically so operates. A stroke of a pen, a mere affixing a name to a skin of parchment, totally changes the whole rule of law applicable to any estate; transferring the right of jurisdiction over it, in great part, from the ordinary courts of law and equity to the ecclesiastical courts.

If such a license were tolerable under any circumstances, it would needs be under conditions which should limit it to certain known localities, and, if possible, preserve some public record to distinguish the anomalous tenure. Copyhold property is so circumstanced. As to these, the limits of the manor define its utmost extent, and the court rolls are a kind of registry of the title. Yet the legislature has set its face against these innocent and harmless exceptions

from general rules. It seeks to extinguish them, by offering inducements and opportunities for enfranchisement. I think the policy a sound one. In a state of society like ours it is important to preserve as nearly as may be uniformity of tenure. But we attack the smaller and leave untouched the greater evil.

I have dwelt so far upon the nature of leasehold tenures, partly because the matter has a direct bearing on the question before us, the length of time for which it is necessary to deduce a title, but partly for the purpose of noticing the objections to any longer continuance of such a blot in our system.

It must obviously be of great importance to a purchaser to ascertain the quality of the estate he is bargaining for. If he is purchasing a leasehold property, the lease creating the term by which it is held must of course form the groundwork of the title, no matter how remote its date. If he is purchasing a freehold he must at any rate be careful to see such a series of transactions shown as may exclude the probability of its turning out to be a mere leasehold. Yet the transactions ordinarily relied upon as excluding this probability are generally of a very ambiguous character. The history of the changes of ownership must be shown by exhibiting the title deeds over a long space of time. But these may fail to disclose the true state of the case. Time comes in happily and throws a veil over the origin of the defective tenure and cures the evil.

I will add, that the extinction of this objectionable tenure appears to me a necessary step in any effectual reform of our law of real property.

But how is this to be effected? First, by prevention for the future. This is shortly and simply done. The limits within which they should be confined may be a question of detail. If they were permitted to the extent of ninety-nine years, such a period would be about commensurate with the probable duration of a given number of lives in

being and twenty-one years after, and so would be assimilated to other particular interests. This is the utmost which the convenience of society requires.

As regards the remedy for the past, I cannot see why the principle adopted as regards copyholds should not also be applied to leaseholds. The remote reversioner, who has no right which can come into esse within 100 years, can scarcely be entitled to any special consideration. A compensation for such an interest as he may have, either in the shape of a gross sum of money or an annual charge, would be easily arranged, and would be so small as hardly to require any very nice adjustment of distribution as between parties having different interests in the leasehold.

Suppose then every term, of which say 150 years may be unexpired, to be converted into an absolute fee simple, subject only to whatever annual payments or charges may be subsisting in respect of it. These annual payments or charges are usually of very trifling amount and would be charged as before upon the newly converted freehold. They would become in the nature of fee-farm rents.

As to terms of which ninety-nine years and less than 150 years were unexpired—suppose them to be converted in like manner into freehold, subject only to compensation to the reversioners.

As to renewable leaseholds, these might either be reduced to the status of leaseholds for ninety-nine years, or enlarged to the status of the fee-simple upon some equitable principle of compensation.

I have hitherto regarded terms of years as subsisting beneficial interests in land. There are others of a different kind called terms attendant on the inheritance. Though a late act of parliament has affected to extinguish them, its operation is so very uncertain, that they still require notice; and as far as I can form a judgment, must still be retained as material elements of title.

I will endeavour to give your lordship some general idea of their nature.

As a mere matter of conveyancing, the creation of a

term of years is a very simple thing. It is in fact a lease (no matter for what length of time), differing in no respect in its legal character from an ordinary lease to an occupying tenant. The simplicity of its mode of creation and its convenience as a subordinate interest capable of being carved out of the inheritance, without disturbing the general order of the limitations of an estate, has made it a very common mode of securing pecuniary charges on land. Almost every will and settlement relating to family estates contains some machinery of this description.

I have said that they were simple and easy of creation. But when once created they were not without their difficulties. When the purposes for which they were brought into being had been answered, what was to become of them? They became a kind of Frankenstein, a perpetual spectre, haunting the inheritance at every step it took. The man who demised by way of mortgage for 1000 years paid off his mortgage;—probably he was careless as to obtaining a surrender of the term;—nor could any provision be made in the deed of creation sufficient to provide for its extinction when its object was satisfied. So it remained nominally vested in the party to whom it was originally limited, descending from him like any other term of a beneficial kind to his executors* or administrators, and so passing it may be through a chain of successive personal representatives.

What then was the status of the party who had carved out of the inheritance of his property this imaginary interest. He was the owner of the inheritance it was true, but the term of 1000 years stood before him. The law could take no notice of the fact of payment of the money secured, as in any way changing the legal rights and powers of the party in whom the term still remained vested. But equity stepped in to remove the difficulty, reconciling it and bringing the two separated interests into

* I do not trouble your lordship with some distinctions to be observed in the application of this rule, they are immaterial to my present purpose.

coalition, by making the term (as it is said) attendant on the inheritance, and converting the holder of the term into a trustee for the beneficial owner. Thus the owner was restored in a great measure to his proper condition, and the satisfied term walked by his side, following all the changes of ownership which the inheritance underwent, as a shadow follows the substance.

Yet it must not be supposed that the term, though stripped of all its independent character as a subsisting beneficial interest, and degraded to the condition of a mere humble dependent, was therefore altogether reduced to an empty shadow. On the contrary, it still held its ground as a real subsisting interest in the eye of the law. If a refractory tenant was to be ejected, or an action of trespass for some invasion of the soil to be maintained, the apparent holder of the term was necessarily put forward as the legal champion of the title; and, therefore, it was very needful that the party intrusted with so responsible a charge should be in the interests and under the exclusive direction of the beneficial owner of whose rights he was to be the protector. Hence the ordinary practice upon sales and mortgages of making assignments of outstanding terms to friendly trustees, nominated exclusively on behalf of the purchaser or mortgagee.

It might seem as if this operated as a drawback and incumbrance on real property,—that it was inconvenient at least, to say nothing of expense, thus to be obliged to resort to a comparative stranger in the simplest and most necessary process of law, necessary for maintaining the right of ownership over the soil. Yet with some evils of this kind, there was some compensating good. Other dangers threatened titles to land. Latent equities became common, and against these an outstanding term, with all its attendant inconveniences, might sometimes be a protection.

Imagine, my lord, a number of charges upon land, merely of an equitable kind, that is, such as the holders

could only enforce by resorting to a court of equity. Of this kind are agreements to execute mortgages, liens, secret or implied trusts and the like. Against such interests as these, lying it may be in ambuscade, no vigilance or precaution could effectually guard. The Court of Chancery was ready to assist any party having the most remote shadow of a right to relief in what it termed equity and good conscience, even at the risk of swallowing up the estate.

As between conflicting claimants, the rule of equity was to regard priority in time. *Qui prior est tempore potior est jure.* The relative positions of equitable claimants was therefore determined by their respective dates; a rule to which, as it would seem, no just exception could be made.

But then came an embarrassing point. If a party had without notice bonâ fide purchased and paid for an estate—had obtained a full and perfect title at law—by which he was able to protect himself and assert complete dominion and ownership over his property,—in short, if he had put himself within the protection of the courts of law, how was the Court of Chancery then to apply its rule of priority, in case the title of the legal holder should come in conflict with that of some prior equitable claimant? It was a difficult point for the court of equity to get over. If, notwithstanding the completeness of the legal title, she still attempted to enforce her rule of priorities—to displace the legal owner, for the benefit of the prior equitable claimant, she was well aware that her whole jurisdiction would have been put in jeopardy. It would not have been tolerated that the legal owner of a property, who had bought and paid for it bonâ fide, and to whom no laches or suspicion of fraud could be imputed, should be ousted from the fruits of his purchase for the sake of a party whose rights were merely the creation of a court of equity.

The Court of Chancery felt that she must surrender her

jurisdiction. She did so, by refusing to assist the equitable claimant, though prior in date, against the superior strength of the holder of the legal title, or, as she said, "the equities being equal, the legal title must prevail."

I confess I have never been able to comprehend this specimen of equitable casuistry. If the rule be true and good, that priority in order of time ought to determine priority of right, I cannot but think that a great compromise of this principle is involved in the priority accorded to the legal owner in the case supposed. I cannot but think that the concession of the court of equity to the jurisdiction of the courts of law partakes rather of the character of complimentary deference to a dangerous rival, (intended, perhaps, as a slight equivalent for former usurpations of jurisdiction) than of a pure zeal for justice. This, however, is beside the present question.

The advantages thus given to the holder of the legal title necessarily added great value to old satisfied terms. Instead of being thrown aside as useless lumber, or condemned to death by surrender so soon as their immediate object was answered, they were raised into importance and preserved with care as integral parts,—indeed, as the most important parts of a safe title. "Give me an outstanding term," said the old experienced conveyancer, "let me secure this by vesting it in some friendly trustee, "who will use it for my benefit, and I may set all interme- "diate equities at defiance. I shall escape all risk from "latent charges or secret trusts; and the more remote the "term, the larger the space of time it will cover—the wider "its operation, the more secure the title."

But against these salutary effects was to be set the expense which they occasioned. They formed a sort of body guard to the title; but then their maintenance was costly. A late act of parliament has so far applied a remedy to this evil, by rendering them henceforth incapable of assignment, but unfortunately without providing a substitute

for the valuable uses which they served. It is true, tha provision has been introduced saving their effect as a p tection in certain cases; but there seems to me nothing the act to define for whose benefit the protection is to su sist, nor in what manner it is to be applied.

It would be idle in me to detain your lordship wit criticism upon an act of parliament. I believe no one w venture to affirm with any degree of positiveness what real effect may be till it has received judicial constructi In the meantime we shall in all probability pursue, nearly as may be, our present course of practice, c tinuing to deduce the history of outstanding terms they actually exist and to notice them as material pa of the title. If this be so, I know not what will be benefit to purchasers resulting from the late act of p liament. It will simply have the effect of preventi them from obtaining the protection which assignme would have afforded. Even as the law before stood, was in their option to adopt that course or not as th pleased.

I have noticed at some length the state of the law regards terms of years attendant on the inheritance, cause the questions involved in them touch very clos the general question which we have before us, and wh presses us on every side, I mean a general registry. T great and serious evils exist in our present system, practice relating to outstanding terms clearly proves; a that these evils cannot be effectually grappled with loose, and, if I may venture so to speak, haphazard leg lation, such as I have just noticed, is no less equally cle If the machinery of attendant terms as a protection agai secret equities and latent charges is to be abolished, so adequate substitute must be provided.

I have now drawn your lordship's attention to so reasons, which I think will sufficiently account for length of time for which it is necessary to carry back

deduction of a title. When you see the indefinite remoteness, in point of time, from which existing interests may take their rise, both in the creation of entails and long terms of years, it will be no matter of surprise that a conveyancer should require the transactions of sixty years to be exhibited before he will venture an opinion on its safety. Sixty years does not in fact by any means comprehend the whole period of possible danger. It is usually adopted, because it represents an average life. And the transactions which have taken place within it generally enable us to determine with sufficient accuracy the true nature of subsisting interests.

I turn to another point, which will strike the mind of a stranger upon looking at a bulky abstract. He will be perplexed at its size. I here suppose the case of one of some length, for no doubt there are cases where a simple and intelligible title may be compressed within a small compass. The question of the point of time from which it is commenced, does not necessarily determine the bulk of the abstract. A title commencing at a remote date may be brought into a brief history, whilst one of recent origin may, by means of a multiplicity of transactions, be swollen to an alarming corpulency.

This involves a consideration in a cursory way of the general character of the transactions necessary to be exhibited as constituting the history of a title.

These transactions may be distinguished into two classes:—

First.—Those which relate to the devolution of the *legal* ownership of the property, or, as it is called, the legal estate; that which courts of law recognize as the right of dominion, to which the actual possession belongs.

Second.—Those which affect the title through the medium of doctrines of equity, and which give rise to what are called *equitable* estates or interests, such as are agreements and trusts.

The first are subjects exclusively within the ju
of the common law courts.

The second are exclusively within the jurisd
courts of equity.

All remedies for recovering or maintaining th
possession of property in a direct way, belong to t
of common law. The ordinary form in which the
dies are pursued, is by actions of ejectment, tres
plevin, &c.

The form in which remedies are pursued in th
of equity, is by a process called a bill, by which t
position of these courts is invoked to help a c
claimant in cases where the law in an ordinary wa
redress.

Your lordship will probably have some diff
comprehending clearly the necessity for such a di
of jurisdiction, and still more difficulty in under
the practical application of that distinction.

But that there must be a necessary difference
diction between the one class of courts and the o
that each has its own proper province, will be clea
on consideration. A like difference exists betwee
of other kinds, as the Admiralty and Ecclesiastica
Where the whole subject-matter is different, it is
to place it under the administration of different cou
properly this is the case between courts of commor
courts of equity. For there are duties which m
to perform, of a nature which the law canno
recognize, and which yet ought not to be left to
voluntary force of moral feeling and conscience.
pily men require stronger obligations to bind the
right. Duties of this kind are within the province
of equity. They must, it is true, be enforced b
on men's consciences through their bodies—whic
only tangible subjects of human judicature. I
there is a wide difference between claims whi

their origin from the mere obligations of conscience, and those positive and ascertained rights which the law in an ordinary way takes under its care. There is a difference, for instance, between my title to a sum of money which another man is under an honourable engagement to pay me, and my right to the money in my purse.

But when your lordship inquires how these principles are practically applied, you will find all the true lines of distinction broken down.* Substantially there is no difference between an equitable interest and legal ownership in real property. The one is equally beneficial with the other, and confers in effect the same right of dominion. I am not now speaking of technical differences. These I shall have occasion to notice; but I refer to the broad practical fact,—that as regards substantive value, and all the ordinary privileges of ownership, there is no difference whatever between interests in real property capable of being enforced in one class of courts or the other. That this is so is clear from the indiscriminate use made by conveyancers of both kinds of machinery. A purchaser is wholly ignorant whether his interest in his property is legal or equitable. What matters it to him, so long as in case of need he has some court through which he can enforce his rights. Nay, it frequently happens that conveyancers themselves are unable to determine the character of ownership. A scarcely perceptible difference in the wording of a sentence is the point on which the distinction hinges. Frequently a lost or forgotten deed discloses an outstanding legal estate, which turns a title hitherto accepted as complete at law into one merely equitable.

Now it seems to me an objection *in limine* to our present system, that it exhibits such a confusion and want of

* I do not mean that equitable interests are of the same monetary value, or are equally secure with legal ones, but that they are both alike in nature as forms of ownership.

distinctness in the first and most important element in
constitution of rights, the practical definition of the re
dies for enforcing them. Is it not a strange thing that
owner of property in full possession as he supposes o
complete right of dominion over it, should be ignor
whether he can in his own name eject a tenant or maint
an action of trespass, and that the law should be in t
state of uncertainty as not to afford him any means
solving such a question? Or when he ventures into
court of law in assertion of his rights, relying upon
strength of his bonâ fide ownership—perhaps plain
notorious to all the world—is it not disheartening to fin
legal shadow set up before him to defeat his proceedi
in some obsolete outstanding legal estate? But wh
does the fault lie? It lies, I am sure, in a system wh
permits fallacious and unreal interests in property, an
obliged to permit them because it has no machinery a
quate to express the real and true title.

The character of real and true ownership of real p
perty is easily enough defined. It is the right to
possession and enjoyment, and the right of dominion o
it. There is no mystery in the thing itself, however
may mystify it by distinctions as to legal and equita
interests. In itself the idea is a simple one.

And that this right of possession and right of domin
must in its nature have the character of unity—must be
integer—a single though a divisible thing—seems to
self-evident. We cannot conceive a right of possession
dominion over an estate vested in one person, and simu
neously also in another person. It is as impossible as t
two substances should at the same time co-exist in the sa
place. This right of ownership is capable of being dis
buted into a variety of interests,—all, however, referable
some particular mode of occupying or disposing of the p
perty. All these various interests the law protects, p
viding for them different remedies according to their nat

All of them together make up that one integral quantity which is represented by the technical term of the legal fee.

The unity and simplicity of the true idea has, however, been lost in the multifarious variety of interests brought in by the doctrines of equity. These are not properly interests in the land, but rights arising out of supposed duties chargeable on the consciences of the owners. The legal ownership has become in this manner only a part of the title to real property. Frequently it stands as a mere form. A new kind of beneficial interest has grown up, which has usurped its place, out of which spring so many and such irregular rights as to create an intolerable burthen on estates; and this is in fact one cause of the great length of abstracts of title.

It may be said that this objection is theoretical,—that as to the supposed unity and simplicity of the legal ownership, according to its true idea, it may be very well suited to a simple state of society,—but that ours is too complicated and artificial practically to admit it,—that the various kinds of rights over real property now in use and recognized as interests subsisting in it are found necessary or highly convenient, and cannot be dispensed with or materially altered without great danger. These and other plausible generalities may be advanced in support of things as they are,—to all which my answer is,—look to the general effect. The presumption at least is on my side. Is not the evil at such a height, that the necessity for change is apparent? I am not arguing from theory to prove the necessity of change; but that necessity being, as I conceive, self-evident, must we not look to theory to guide us as to the true principles on which to proceed in the work of amendment?

But besides this, I am fully persuaded that no true theory ever brought with it any practical ill consequences. The maxim is unsound that theoretical truths are practical falsehoods. We may be mistaken in our views, but this is an evil which lies in ourselves. Truth is truth, though

error is sometimes mistaken for it. The happy coin
between truth and utility is one of the marvellous ev
of an all-wise and benevolent Providence.

If therefore the true theory of ownership be su
have described, I am warranted in saying that a pr
tion lies against all that part of our present systen
evidently offends against it; I mean the whole doc
equitable as distinct from legal estates.

I will endeavour to give your lordship, from a sin
stance, a general idea of the character of these eq
interests. Let me take the case of a portion or lega
instance, to which a testator has subjected a devised
It is said this is an implied trust in the devisee. It
the testator had said, "I give you the property in t
converting an adequate part of it into money to pay t
tion or legacy." The money so charged becomes a
table interest in the property. The party entitled t
the power of dealing with it at pleasure,—may sell
pose of it. As a charge on property, it becomes a v
security. Its value, however, it is said, and conseque
utility, depends on its being a subsisting interest in t
perty itself, from which nothing but payment can dis
it. It will be said,—"Do you mean to extinguish pr
of this kind? You will in doing so unsettle h
affairs of the kingdom."—I mean nothing so rash
us examine the matter a little more minutely.
is it that such a charge becomes a subsisting inte
the land, so as to become identified with and pa
the ownership? Why is it necessary to be re
upon an abstract as belonging to the history of th
for the guidance of a purchaser? It is for this
The person who is entitled to such a charge has
at any time to call on the owner of the property c
for payment of the money, and, in default of pa
to apply to the Court of Chancery, which will
him to make good the money by sale of the

Such is the claimant's right. It is one which it is reasonable to enforce by such a remedy; nay, in my own opinion by a remedy far more summary and effective than the tedious and expensive process of a chancery suit. So far my objection does not apply; but this does not by itself make the charge an interest in the property, for if it rested here, it would be defeated by a sale of the devised estate. It assumes this character, because equity adds to this a rule borrowed, if I may dare so to speak, from some false principle of casuistry, in order to charge it not simply on the party whose duty it was originally to pay it, —namely, the grantee or devisee of the property charged, —but on each succeeding owner. Thus if an estate were devised to me, subject to the payment of a given sum of money, not only would the liability affect myself, but if I sold the estate to your lordship, you also would be charged with it, and so on from owner to owner ad infinitum.

The doctrine is that in such a case the charge, operating in the nature of a trust, not only obliges the donee in honour and good conscience to pay the money, but if he parts with the property, the new purchaser or donee, *who has notice of the charge*, is equally in conscience bound to fulfil the neglected duty. There is a kind of privity of conscience (arising out of the fact of notice) between the original and succeeding possessor which communicates the duty and liability from one to the other, and will do so through any series of dealings. *Notice* thus becomes the foundation of the supposed right.

There is a plausible appearance about such a doctrine which at first sight leads us to accept it. It seems to lean, at any rate, on the side of justice and conscience. But try it more closely. Admitting that the conscience of the original donee in the case supposed, is bound to fulfil the duty annexed to the gift, how does that duty communicate itself to the party who purchases under him? Is the purchaser obliged in honour and conscience to see the duty

fulfilled? The common voice of society answers
negative. Practically we insert stipulations in all
which we create trusts involving duties of this k
pressly guarding against so mischievous a rule. Th
of society is in this case only the echo of the
common sense and sound morals. A purchaser of p
cannot be bound to trouble himself, as to any omi
breach of duty, of which *subsequent* to his purchase th
selling to him may be guilty. If, *by law*, I have
to sell and convey an estate to your lordship, it is st
inconsistent to invent an imaginary rule to tax you
ship with seeing to the mode in which I may em
misemploy the money which you pay as the price
question really hangs here. Does the law give th
lute right to convey? If it does, the purchaser's con
is absolved.—I am, of course, here speaking of o
bonâ fide cases,—not where there may be fraud or co
The rule of Equity confuses moral duties and legal

Or putting it in another way, it is a case of the
principii. She charges the innocent purchaser, becau
says, the law does not give the party, of whom he b
absolute right of conveyance. But this begs the whol
tion. The law would give such absolute right, wer
for the intervention of the rule of equity. Undoubted
law did intervene, and prevent the vendor from abs
conveying his estate, except either subject to the ch
throwing on a purchaser the onus of seeing to its s
tion, this veto on the absolute right of conveyance
require to be effectuated as any other incident to
ship. But equity seeks to give to mere *notice* th
of such a veto. That operation which ought to
pressed in a clear, definite and palpable form as an
the law itself, is attributed to *a notice*. The effect of
is made equivalent to an actual injunction of the C
Chancery restraining the right of disposition. B
difference between such a process and mere notic
wide as between any two things totally opposite i

nature. The one is the formal interposition of a competent jurisdiction, whose acts are supposed to be and are capable of being recorded and made notorious to the world, obliging all persons by their proper intrinsic force. The other is—nothing. I cannot find any other language to express its total negation of all essential qualities for such an operation.

No doubt, to bring in the machinery of injunctions in such a case, would be to crush the unfortunate rights which were meant to be protected. A bill in equity for an injunction to restrain every owner of property from selling his estate, except subject to or on satisfaction of the charges upon it, great and small alike, and a separate bill for each particular charge down to the humblest legacy of 20*l.*, would be quite intolerable. I refer to this existing machinery as suggesting an idea of what is really wanted—*a visible legal check* on the transfer of the property incumbered, and which alone can be effectually supplied by a general *registry of titles.*

No doubt the rule of equity was invented with regard to these considerations. It was felt that under present circumstances an actual interposition of the law in a formal manner, restraining the right of alienation, would be impracticable. And it adopted the principle of notice as a substitute; straining for this purpose the rule of morals as to the obligation on the conscience of a purchaser very far beyond its legitimate extent. Even though the rule had been perfectly true and right, it overlooked the fundamental difference between such a rule and a formal rule of law, and attempted to give the one the force and effect of the other. For it may be (I do not say it is) right to say, that a purchaser *ought not* in good conscience to buy without seeing that the vendor does what he ought with the money paid. It is a very different thing to give to such a rule the operation of a law forbidding him to purchase without doing so.

These distinctions may seem to be too fine to be really

important ;—I ask your lordship to look at the bulk of an abstract of title and the present evils of our conveyancing system, and I then leave you to judge whether a point on which these in a great measure turn is or is not important.

But what is notice?—the private knowledge within the secrecy of a man's bosom, incapable in the nature of things of being proved by external evidence, except in the loosest and most vague manner. Equity is obliged to invent a system of artificial rules to meet the demand for this external evidence,—these rules involving frequently the grossest possible injustice. Thus notice is not only express but constructive. If your lordship buys with *notice* of a pecuniary charge on the land purchased, brought actually to your knowledge by appearing on the face of some deed or will under which the title is derived, that is *express notice.* It is put before you in a form which necessarily conveys the knowledge of the fact to the mind. But equity cannot stop here. If confined to this, the doctrine of notice as a basis of title would be far too precarious. The rule is therefore strained many degrees farther. If such a notice can be implied *constructively* out of any apparent acts, as if your lordship's solicitor should at any time have received notice of such a charge in the course of his transactions, which it was his duty to communicate to your lordship, that would be held to have the like effect as notice actual and express to your lordship personally. By such a principle the whole law of real property is thrown into a sea of doubt. And the wonder is—not that titles to property are so full of difficulty, but that the mischief is not tenfold greater. Its natural enormity is really mitigated in practice.

I cannot imagine an efficient reform of our law of real property which shall not embrace a thorough revision of the whole doctrine of notice, with the view of entirely excluding it as a basis of rights over real property.

But I desire to show your lordship that this doctrine, contrived as we suppose for the security of holders of

pecuniary claims of this kind and intended to give them value, in reality operates to their prejudice as compared with a system which should embody their true principles. The inherent weakness of this kind of interest in land is the basis on which they rest. For to ground them on nothing more substantial than notice is to write them on a quicksand.—I have already drawn your lordship's attention to the risk which they are subject to, when the legal owner who purchases without notice overrides them without leaving them a remedy. The holder of such an interest is thus cheated into a belief that the law insures him protection, whereas, in fact, it leaves him at the mercy of accidents. Hence it is, that, practically, interests of this kind are looked on with jealousy and alarm, and this affects their actual monetary value. This shows itself in the higher rate of interest which all equitable charges are accustomed to bear,—in the impossibility in an ordinary way of procuring loans on second mortgages,—and a variety of other forms. In all these cases the question which deters parties from dealing freely with such securities is—not the value of the subject-matter of the security, for this we may suppose to be beyond question, but the dangerous tenure by which it is held.

Two evils of an opposite kind are thus contained in our present system;—a mass of multifarious interests of the most doubtful and uncertain kind, affecting titles and embarrassing purchasers,—and a weak and inefficient security on which they themselves rest. Both evils spring from one root, and both admit of one remedy. For a general registry of titles would represent in a clear manner to a purchaser the actual status of the property he is dealing with;—it would also serve as the machinery for preserving and enforcing in a simple and effectual manner the rights of the incumbrancer.

I hope I shall be able to show your lordship presently a mode not open, as I think, to any fair objection in which this may be done.

What I have already said will serve as a general introduction to the whole question of trusts, as a form for creating interests in real property.

I have noticed one kind of equitable interest, that of a pecuniary charge under a will. But trusts are of large operation, embracing every modification of ownership—and the power of the cestui que trust (a term denoting the party entitled to the benefit of the trust), over the trust estate, in all its forms virtually supersedes that of the legal owner. The consequence is not merely that rights new and multifarious, but of a totally different nature, are imported into titles. For legal and equitable interests are the subjects of jurisdiction to different courts (in itself a great evil); and whilst the legal ownership is governed by its own proper canons of descent and modes of transmission, the equitable right becomes frequently changed into the character of money. It is then in the eye of a court of equity—personalty—transmissible and descendible according to the rules applicable to mere personalty. This operation takes place by the application of that doctrine to which I have already drawn your lordship's attention, the doctrine that a purchaser is bound to follow his money and see that it is duly applied, and that he is affected in point of conscience with all the omissions of that duty by previous trustees. The right to money payable from the proceeds of an estate becomes thus an actual interest in the estate itself.

Hence, if an estate is devised to a trustee in trust to convert it into money and to divide the proceeds,—the interest of the trustee is governed by the rules incidental to the ordinary legal title,—the interest of the cestui que trust is governed by the rules applicable to money. So that two sets of ownership are presented on the face of one and the same title, and of opposite characters. Both must be deduced, frequently with great difficulty and at heavy cost. Money passes to executors or administrators, and is divisible

amongst next of kin. If real property has thus been turned in its nature into money, perhaps administrations must be taken out or wills proved, involving the necessity of paying probate and legacy duty in respect of that which after all is nothing more in substance than an interest in land. Sometimes the conveyancer is quite unable to determine with certainty what the true character of the ownership really is. Conceive, my lord, a state of things in which it may be, in the probable course of things, a matter of doubt whether a landed estate shall pass under a devise of land or money,—whether it shall pass to the heir at law or to the administrators and next of kin;—and think with such elements of doubt in our system, is it to be wondered at that we should experience the practical evils we complain of—uncertainty, delay and expense in the elucidation of titles?

Your lordship will perhaps be not altogether uninterested in knowing something of the history of the progress of this law of trusts. It will, I think, lead to a clearer understanding of the true principles by which they ought to be governed.

The original idea of a trust is very simple and intelligible. It is a confidence reposed by one person in another for the performance of some office which the party confiding is personally unequal to. I cannot imagine a state of society in which trusts, in some form or another, must not have subsisted. Indeed until you destroy altogether men's confidence in each other, or remove every occasion for employing a substituted agency in the transactions of life, trusts must form part of the machinery of society. Persons on their death-beds, anxious to secure the interests of their children, or parties disabled by distance or other accidental circumstances from personally transacting necessary matters connected with property, are obliged to have recourse to other persons, on whom to devolve its custody. And as for legitimate so for illegitimate purposes,

no doubt trusts are equally available. The dishonest debtor, seeking to evade his creditors, resorts to this species of artifice;—persons desirous of avoiding the disabilities imposed by law either on the disposition or acquisition of estates will do the like. Thus the clergy made use of them to evade the law of mortmain; and in the troubled periods of our history, persons involved in civil disturbances sought to escape in this way, in part at least, from the penalties of treason.

But I need not multiply instances. Trusts, indeed, are so natural, and I may say necessary, that though perhaps not occupying a formal place in English jurisprudence, they must have subsisted here as elsewhere from the earliest periods.

A learned writer* tells us that trusts were introduced about the reign of Edward the Third. I think the observation must be limited to their formal recognition by the legislature. Not only are they, as I have said, so natural to every form and every period of society, but there are special reasons, I think, for believing that they must have had a more settled existence amongst us prior to that date.

They formed a distinct feature of the Roman law,—a system of jurisprudence which† prevailed in Britain during the ascendancy of the Romans here. It is true that subsequent changes extinguished all traces of the Roman authority, and with it no doubt in a general way all remains of their law. Yet the ecclesiastics, who about that period began to be immediately dependent on Rome, would naturally imbibe and disseminate the spirit of the Roman law, and the church, which then began to be infected with secular tendencies, would not neglect an instrument so easily turned to her advantage.

In this manner the principle of trusts would probably be known, and their use no doubt in some degree admitted

* Sanders on Uses and Trusts.

† Selden's Dissert., in Flet. c. 7.

in this country, at least so long as the civil law continued to prevail in the Western Empire.

When the law of the Eastern Empire was revived in the West, in the twelfth century, a great effort was made by the ecclesiastics to introduce it here as elsewhere. During this period it is impossible that the theory and practice of trusts should not, to some extent at least, have found its way into English customs, if not into the law itself—for churchmen filled the highest offices in the law.

And so the first act of the legislature, that of Edward the Third, which recognizes their existence, clearly deals with them as settled modes, by which men were accustomed effectually to answer particular objects, showing that they were in established use.

They may not, it is true, have been enforced by any positive jurisdiction, as they now are by the Court of Chancery, though probably there may have been some rude and simple mode of appeal to the sovereign. The jurisdiction of Courts of Equity is of later origin. But they would naturally come under the special care and protection of the church;—and in an age when ecclesiastical authority was of so high and binding a force, this would have been a sufficient sanction to give them the effect of law.

Such would have been the original position of trusts, resting, like all other obligations of a moral nature, upon the strength of conscience, and a sense of shame and the authority of religion.

They assumed a new character when the law added to them its protection.

There are two ways in which the law intervenes to protect trusts.

First.—When it simply compels the fulfilment of the obligation by holding out the terror of punishment to a trustee who is guilty of a breach of trust, a jurisdiction exercised by the Court of Chancery—to which no just exception can be made.

But there is a second step which the law makes, overleaping all the lines which distinguish trusts from actual ownership. This happens when it supersedes altogether the free agency of the trustee, converting a moral claim into a positive right. This indeed altogether destroys the nature of a trust, for when all discretion on the part of the trustee is removed, and all dependence on the part of the cestuique trust, the trust, though it may remain in point of form, is in reality changed into a legal right.

It is of course reasonable that the discretion of the trustee, and therefore the confidence reposed in him, should be limited by the object for which he is employed. Sometimes that object cannot be effected without lodging in him the absolute dominion over the property entrusted to him, embracing all the powers of present ownership, as well as of alienation, and constituting him the virtual proprietor. Such is the case of a trust for creditors or infants, where it is intended to give the trustee a discretionary power of sale, as well as of present management. Sometimes the object is qualified, as simply to confine it to the power of sale, without charging the trustee with any of the duties or responsibilities incident to the possession or management of the trust estate, as where a party grants or devises to a trustee, in trust to sell and divide the proceeds amongst other parties. Or the trust may be simply to manage the trust estate for a qualified period,—to receive the profits, and employ them for the benefit of another party, without intending to confer any power of disposition over the inheritance.

These I think represent the general nature of trusts of all kinds:—

They are either absolute,—as well over the dominion as the possession; or they are qualified and limited to one or other of those objects.

These alone can, I think, be recognized as true and genuine trusts.

There are besides these, trusts of a spurious character,

which have indeed their form, with none of their proper attributes.

As for instance—

If I give the legal possession of property to A. in trust for B.,—that is, to permit B. to occupy and hold it, and assume and exercise all the ostensible rights and powers of the true possessor, such an arrangement involves no duty or responsibility on the part of the trustee, and does not in fact place B. in any different position in the eye of the world from the legal owner himself. The world cannot distinguish the nature of his interest, except by his visible occupation. It is in fact merely a colourable and collusive transaction.

A similar case is, where a person gives the legal dominion over property to A. in trust for B.,—that is, to dispose of it as B. shall absolutely direct, the trustee himself having no power nor any active duty, and being merely a passive holder of the trust estate, to *make estates*, as the term is, for the benefit and under the entire control of the cestuique trust. Such a transaction is colourable and collusive.

And these distinctions seem to me to indicate the true difference between what the law terms *uses* and *trusts*. The former term describes, as I venture to suggest, the spurious or collusive trusts. The latter term applies to trusts in their genuine *sense*.

And this, I think, will appear from examining the different acts of parliament in our early law relative to uses and trusts. They seem to me all of them directed against the spurious trust, called, as if by way of distinction, *the use*. They do not certainly indicate any intention to prevent the employment of trusts for legitimate purposes.

It is I think to be regretted that these distinctions have not been observed in our modern equity law. The Roman law, as far as I understand it, seems to me in this respect to be founded on more accurate principles than

our own. There the distinction between the usufructus, the usus, and the hereditas fidei commissa, represents better than ours the difference between the absolute right of beneficial enjoyment, such as is implied in the notion of a use in our law,—the limited or qualified right to a mere kind of daily sustenance from the profits of the trust estate, such as approaches nearly to our genuine trust,—and the right of dominion over the inheritance for some fiduciary purposes, such as is the trust for sale.

The first important act relating to uses was the 50th Edw. III. c. 6, by which in cases where persons inheriting property disposed of it collusively, reserving the right to the profits at their will, creditors might have execution as if no such gifts had been made.

This appears to have been directed against that species of fraudulent trust or use, where the title of the trustee was merely colourable. I do not know how far it would have been held to apply to the case of a trust properly and strictly so called, where the actual right to perception of the profits was with the trustee. Whether however that distinction may or not have been observed, a new practice was introduced, by which creditors obtained rights over trust estates, irrespective of the title which the trustee continued to hold in the eye of the law.

I do not know at what period the rights of the cestuique trusts became the subject of transfer. As regards collusive trusts, the right of the cestuique trust to transfer it ad libitum seems a natural incident. As regards trusts involving personal confidence, the right to transfer the benefit of them is not so clear. For the confidence reposed in trustees is in its nature merely personal, creating obligations towards the immediate object of the trust, which can scarcely be transferred without mutual privity. But that a general practice of transferring these interests had grown up, and was established prior to the next important act in the statute book (the 1st Rich. III. c. 9,) is clear

from that act, which was evidently only intended to give full effect to existing custom.

This act enabled the cestuique use actually to convey the estate so as to transfer the legal ownership, giving him the full dominion of an absolute proprietor over the inheritance.

The third stage of this history was the statute called the Statute of Uses (27 Hen. VIII. c. 10,) by which the full qualities and attributes of legal ownership were annexed to trust estates, giving to their holders all the capacities of defending their title at law, and making them completely independent of the trustee.

Whether the object really was to extinguish trusts as interests in land, or whether it merely intended to give the actual party entitled to perception of the profits, the legal powers necessary for securing his title, is a question sometimes discussed. The higher authority seems to be in favour of the latter opinion, and there certainly seems nothing either in this act, or in those which preceded it, to contradict such an opinion.

I have pointed your lordship's attention to the different character of trusts;—They are—

1. Spurious and fraudulent trusts, where the legal title is in one party, and the actual beneficial interest and right of possession or dominion is in another.
2. Genuine and true trusts, where a duty of an active and really responsible kind is imposed on the trustee.

Against trusts of the former sort, the statutes I have mentioned are evidently directed; and the act of Henry VIII. was undoubtedly, as I conceive, meant virtually to abolish them, by giving them their true character of legal ownership.

There seems nothing to lead to an inference that any alteration was intended to be made in trusts of the latter description. Indeed, the jurisdiction of equity as to these

was so useful and so well established that we cannot imagine the legislature intended to abolish it,—at any rate in this indirect manner.

But equity was unwilling to lose that vast amount of jurisdiction over real property which accrued to her in right of the previous doctrine. Although the object of the legislature was plain and patent, and as agreeable to reason as to the common sense and understanding of the words of the statute, yet equity slipped aside from their effect by a kind of legerdemain.

It availed itself of a rule—no doubt borrowed from antecedent practice, that a use or a trust—for the words are generally treated as synonymous—cannot be limited upon a use. So that if a party conveyed his estate to A., to the use of or in trust for B., there the statute executed the possession (as it is said), that is, transferred the possession to B., but there its operation stopped. So that if a provision were added, that B. should hold to the use of or in trust for C., the statute was not held to apply to such a case,—the interest of C. was held to be within the province of equity and not of law;—so that although in reality C. was the actual and true occupant of the property, assuming and exercising all the ostensible rights of ownership, yet he had not the legal title in him, so as to protect himself in the ordinary courts of law. Thus the effect of the statute was merely to add a few words to a deed of conveyance, and all the vices inherent in the previous state of the law were restored.

I have remarked that it was no doubt the true object of the statute of Henry VIII., to give effect to the distinction between genuine and collusive trusts. The rule of equity, applied without discrimination, again effaced the distinction.

The rule itself is evidently founded in truth. If I give to A. a thing to hold in trust for B., it is absurd to add that B. shall hold for the benefit of C., and C. for D., and D. for E., and so on with an interminable succession.

There can be properly but one person in legal custody of the trust estate, and one party entitled to its beneficial use.

If trusts had been confined within their proper limits, it is probable that equity would not have violated its own rule in so flagrant a manner as it now does. If no trusts had been recognized, but such as were of a true and genuine character, involving active duties on the part of the trustee, and actual dependence on the part of the cestuique trust, the reasonableness of such a rule would have been apparent. Trusts would then have been as they should be, and as they should be made to be, intelligible things, implying a bonâ fide relationship between the two parties.

A deviation from the rule would have appeared plainly absurd. We may judge of this by a common instance; I wish to create a trust for sale; I devise an estate to trustees in trust to sell it, and to apply the proceeds for the benefit of such or such a party. Suppose I were to add that this party is not really to retain the money, but is to hand it over to a third, who in like manner is to pass it to a fourth, and so on in succession, like the child's game of hunt the slipper. This would be pronounced at once idle and absurd, serving no other object but to perplex and complicate the transaction.

But when the collusive trust is introduced by which the trustee is made to stand as a mere legal form, whilst the cestuique trust assumes all the functions of ownership, the case is changed,—the rule loses all its reason and all its force. The cestuique trust, who virtually is in custody and occupation of the property, is as capable of serving the office of a trustee for another party as the holder of the mere legal title; and so the same process of substitution may be applied without limit, till in the multitude of substituted trusts upon trusts and equities on equities, we lose all clear perception of the true ownership. Hence it frequently arises on sales and mortgages, that not only

is there much difficulty in following the various derivative rights which are built one upon the other, but great trouble and cost is incurred in getting in a number of merely nominal outstanding interests.

There are two practical consequences which I would deduce from what has preceded.

1. That the distinction between the true and the fictitious trust should be revived and made effective.
2. That real property should be relieved from the load of equities on equities which now incumber it, and that no one but the *immediate* object of the trust should be noticed as having an actual claim on the land.

Of all the causes contributing to the complication and difficulty of titles, that which I have last noticed is perhaps the most pernicious.

It will be said that a great mass of interests depend on this system,—that practically the benefit of the present law is greater than the loss, and that the advantage to the different parties who obtain security through the machinery complained of more than compensates for the inconvenience suffered by vendors and purchasers.

I grant readily that there is weight in this reply,—that derivative rights (now classed under the general head of equitable interests) in real property, must be made capable of being transferred and dealt with as substantive and independent interests; and with this view I admit that a registry of titles should be so constructed as to effectuate as perfectly as possible the various subordinate interests which in our present state of society must needs grow up. But I recur to what I have before said with reference to the fundamental objection to notice as a basis on which to rest their title. It is an unsafe foundation for them—deluding their holders into fancied security, and leaving them to the mercy of accidents. In fact the machinery of a general registry is required for the sake of parties having these derivative interests, no less than for vendors and purchasers.

A view of the burthens upon titles to real property would be incomplete without noticing one other point,—I mean fixed annual money charges. Such are—various kinds of rents, usually small in amount, but troublesome as matters of title, annuities, rent-charges, &c. I except from this list land-tax and tithe commutation rent-charge, these being in the nature of public imposts.

I may, however, add a suggestion, that a revision of the land-tax generally, and some mode, if practicable, for adapting it to the changes of property which are constantly taking place, would be extremely desirable. The practice has commonly prevailed of never altering the assessments; so that by degrees a notion grows up that the land-tax on each particular parcel of property is fixed and invariable. Then some parish agitation produces a revision of the assessment, and parties feel or fancy themselves aggrieved by the alteration of relative proportions.

I must add, from practical experience, that alterations of land-tax assessments are inconvenient and troublesome. It may be worth consideration, whether a general power of redeeming the land-tax for gross sums of money calculated upon some fixed scale, as at the rate of twenty-five years' purchase, may not be advantageous to landed estates, without being materially injurious to the revenue. The power of getting rid of the commuted sum by instalments would be a still further benefit. The present high rate of the funds offers little temptation to parties to redeem land-tax, nor is it likely to be otherwise. Redemption of land-tax seldom takes place to any large extent, except with a low price of the funds, and upon terms disadvantageous to the revenue. The burthen and charge of collection would of course be an item of saving.

As to tithe commutation rent-charge, I heartily regret the change in the character of this kind of property. I believe it to have been of no practical benefit to any party. As to pecuniary amount, I think on the whole the tithe-owners, ecclesiastical and lay, have been somewhat gainers;

but the church has suffered far more in the insecurity of her present title, than she can possibly have gained in income. Her title now has lost all trace of its sacred origin, and rests on an act of parliament,—a foundation very precarious for such a species of property.

The objections which occur to me as to fixed annual money charges on land apply in some measure to tithe rent-charges. Your lordship will perceive their application when stated.

Annual money charges on land are of various descriptions. They are either incidents of tenure, as rents of all kinds, or they arise out of the law of uses and trusts.

As to rents or annual payments incidental to tenure, these may be subdivided into—

1st. Those which are incidental to an actual beneficial reversion, as in the case of an ordinary tenancy by an occupying farmer, or in the case of a building lease. In these cases, the rents payable by the lessees are said to follow and be incident to the reversion.

2ndly. Those where the origin of the rent may have been in tenure, but as to which there is no actual beneficial reversion, or one so remote as to be indiscernible; as where lands are held of manors, subject to quit or chief rents; or where estates are held by grant from the crown, subject to reserved rents, sometimes called crown or fee-farm rents; or where rents are paid in respect of very long leaseholds, as terms of 1000 years, which I class under this head, because the reversion in such cases is so remote as to be in fact a nullity.

The small manorial payments charged on freehold property, which are very common, and are called chief or quit rents, arise ordinarily out of a commutation for feudal services due from the inferior freeholder to his superior lord upon some remote subinfeudation; and they would probably be evidence of a relationship of tenure, which might be important in so very improbable a case as that

of an escheat. But this right of escheat is one of those bare possibilities which it would be idle to think of protecting at the sacrifice of any positive advantage of another kind.

If the principles which I have before stated be correct as to the degree of control which any present generation of men are at liberty to exercise over titles to property in futuro, they will serve to determine the question how far charges of this character are or are not reasonable or tolerable.

An annual payment charged upon land operates as a disqualification upon the ownership of the land charged. It curtails and abridges that perfect right of enjoyment and dominion which presumptively belongs to each passing generation successively. If it be unreasonable that men should be permitted to create interests in property, stretching the exercise of their own will or fancy into a remote distance of futurity, the same rule equally applies to a permanent impost of annual payments. Indeed, as to rents incidental to tenure—in shortening the power of creating future interests, you virtually destroy the power of creating this kind of permanent annual charges. The one must of course be the measure of duration to the other.

And this seems to me to serve as a sufficient index to the true principle which ought to guide us generally in the creation of fixed annual payments charged on land, whether as incidents of tenure, or arising out of the law of uses and trusts. Charges of the latter kind most frequently arise under wills or settlements. A man seeks to provide an annuity by way of jointure for his wife on marriage, or for a relative by will. I need not trouble your lordship with distinctions (immaterial to my present purpose) as to the different forms in which he may effect his object. In substance, a remedy is given, either directly by entering on the land charged and taking the profits to answer the annuity, or by resorting to the Court of Chancery to com-

pel the owner of the land to discharge arrears. I am not, however, now concerned with the mode in which these transactions may be effected, but as to their reasonable duration; and it will be seen that under all ordinary circumstances, the period either of ninety-nine years, or of a life or lives in being, and twenty-one years after, must be the full time which a party can reasonably desire to enable him to provide for family arrangements.

Your lordship will probably ask, what practical evil results from permitting charges of this kind on real property? How do they incumber titles, or diminish value?

I think practically they will be found to produce both effects.

As to the incumbrance on titles, I will mention an instance within my own knowledge.

A very large property in tithes, in fact constituting the whole possession of one of the great religious houses, is held under a grant from the crown, upon which a fee-farm rent of about 45*l.* per annum is reserved. The rent is reserved in respect of the whole property comprised in the grant, and is therefore chargeable on the whole jointly and on each parcel indiscriminately. The possessions so granted have undergone minute subdivision, so that I conceive not less than 200 proprietors may be found liable jointly to the annual charge. A portion of the property has been set apart as an indemnity to the rest, and from this, in fact, the rent is annually paid. The holders of the exonerated portions are indemnified by a specific security on the portion so set apart, vested in a trustee for their benefit. These properties are undergoing continual changes of ownership. Upon each sale or mortgage the question arises, How is the property indemnified against the fee-farm rent? It is answered by reference to the security which I have mentioned. This is followed (I do not speak of the usual practice, but of what occurs in the case before me, and may be done constantly,) by a requi-

sition for the production of the title constituting the security—a special declaration of trust by the holder of the security,—and a covenant to produce the title deeds relating to it. The demand cannot be said to be unreasonable. The incumbrance is not of slight amount. The owner of the rent (who is in this case the purchaser under the crown) is not bound to take notice of the special appropriation of a particular portion of the estate as the fund for payment. The rent may be inforced, in case it falls into arrear, against any part of the property charged. There can be no safety to a purchaser from such a risk, except by obtaining an express declaration from the trustee that he will use the security vested in him for his protection; and in order to enable him to perfect his title to a purchaser in case of resale, he must be able to compel the production of the muniments relating to the indemnity. The whole of this may probably involve an expense of 25*l.* or 30*l.*, or, if he thinks it necessary to have copies of the deeds—more.

Now consider, my lord, the effect which a repetition of all this trouble, expense and delay (for the three evils run hand in hand) must have if occurring in reference to all the portions of property held under the incumbered title. I suppose there are 200 distinct proprietors. In the common course of things their property may change hands on the average once in every twenty years, giving an annual average of about ten transfers of one kind or another. If the expense be multiplied by this average, it will give a total result of about 250*l.* per annum, expended annually in protecting property against an annual charge of 45*l.* I do not say that it is usual to have recourse to such elaborate machinery in all cases. If it were so, the evil would be intolerable. But this shows how much the natural operation of the system is mitigated in practice, and how wide a field is left to the discretion of practitioners. And, indeed, the neglect of these and similar precautions in completing sales or

mortgages is always attended more or less with risk, and throws more or less of improper responsibility on the solicitor.

A single instance will prove the point which I wish to establish. Indeed, your lordship will see how, as property becomes subdivided in the course of years, cases of this kind necessarily must happen.

I have said also that permanent annual charges affect the intrinsic value of property. This we may bring to the test of actual figures, for the depreciation of monetary value represents some positive loss or disqualification. There can be no doubt that a liability to a fixed annual outgoing is a drawback on the general desirableness of an estate for purchase, especially if the outgoing is of considerable amount. A person investing money on land desires to have it perfectly unincumbered. He does not enter into calculations of a balance of profit and loss. He looks to the clear and entire profit of the thing he buys. If it is incumbered he has but a divided ownership. There are also positive as well as ideal inconveniences which he suffers. The necessity of providing fixed annual sums at particular periods, which may or may not suit his ordinary arrangements, is to say the least an inconvenience. The neglect of these periodical liabilities exposes him to the extremely disagreeable risk of an entry by the unpaid incumbrancer, or a bill in equity to compel payment of the arrears. The question is not whether practically these are grievances, which must in the course of things be submitted to as matter of necessity as incidental to the ordinary arrangements of society. No doubt this is so; and this must be taken as a sufficient answer to any sweeping objection against charges of this description altogether. But we are looking to them as *permanent* and fixed disqualifications upon the ownership of the inheritance in perpetuity. It is reasonable that we should ourselves submit to some privation or benefit for the sake of

some compensating advantage of which we derive the benefit. But it is unreasonable that we should attempt to impose the same burthen on our posterity for ever. Indeed, they will shake off the load.

These fixed monetary charges enter largely into the question of the convertible value of property, and this expresses in the clearest manner their real effect. For instance, suppose the case of a perfectly unincumbered estate, returning a clear net income of 500*l.* per annum. Assuming it to be in a desirable situation and having ordinary advantages, its value may be fairly taken at thirty years' purchase—15,000*l.* Suppose the same estate to be charged with a permanent annuity of 150*l.*, reducing thereby the net annual value to the owner to 350*l.*, the total value of the property so charged will be: 1st, the convertible value of the annuity—added to, 2dly, the convertible value of the property itself, subject to the incumbrance.

The value of the annuity cannot, at the utmost, be estimated at more than twenty-five years' purchase. No unimprovable income of this kind ever in an ordinary way exceeds this. Even tithe rent-charge, which is perhaps the best secured property of the kind, will not bear a higher value as mere investment for income, though it sometimes produces more when bought by an owner to relieve his property from incumbrance.

Estimating therefore the annuity of 150*l.* at 25 years' purchase as worth . . .	3,750	0	0
There remains the estate subject to the incumbrance.—But an estate so circumstanced is depreciated to an extent which I do not think I exaggerate at two years' purchase. The net income of 350*l.* cannot therefore be valued at more than 28 years' purchase or	9,800	0	0
Making a total of	£13,550	0	0

Showing that by the mere operation of fixing a permanent annual payment on the land, the value has been reduced upwards of 1400*l.*

I do not mean that where the outgoings are small, they seriously affect the value of the estate, except to the extent of their actual monetary amount. But this is a question of degree and amount, nor under the present system is there any fixed limit; and where the outgoings are small, their convertible value is proportionately less and they are in themselves less objects of consideration in the eye of the law.

If these views are correct, they lead to two practical results.

First. The expediency of providing a check on the creation of permanent interests of this kind for the future.

Secondly. A remedy for the past, by giving to owners a power of redemption upon equitable terms.

In arranging the necessary machinery for effecting the latter object, one point to be provided for is the subdivision which property charged with these annual payments continually undergoes, and the consequent difficulty of determining the relative proportions in which the divided portions should be made to bear the gross charge. This has been kept in view in the Tithe Commutation Act. The plan adopted with reference to a subdistribution of the tithe rent-charge, is by reference to the land-tax commissioners. And this appears to me equally applicable to annual charges of other kinds. There would be a practical benefit to titles, if, independently of all other alterations, some principle of this kind were introduced. It might be made also to provide for such a case as I have before described, and enable the owners of property *virtually* exonerated, to discharge themselves *legally* from a mere nominal liability.

I have thus endeavoured in a superficial manner to draw your lordship's attention to some of the leading fea-

tures of the law of real property, which tend to produce the mischiefs so generally complained of. I think I have shown sufficient cause to explain the sometimes enormous bulk of an abstract. If you consider the length of time for which it is necessary to carry back the title, the number and diversity of interests which may grow up in the course of the various transactions respecting it, and the responsibility imposed on purchasers, all cause of surprise will be at an end.

I asked your lordship to accompany me through the stages of a conveyancing transaction. I will detain you very shortly in bringing your journey to an end.

The abstract having been handed to the purchaser's solicitor, it is his business, (with the assistance of counsel in difficult or important cases,) after having verified it by examination of the original documents, to investigate its effect. Every material transaction must be proved, at however remote a date, and however difficult to trace. The compliance with all the requisites of an overscrupulous purchaser frequently occupies a very long time. I have known not months or weeks, but years consumed in the inquiry. For what amount of evidence may be accepted of particular facts, as of the deaths of parties, the discharge of debts and incumbrances, and the like, is altogether a question of discretion. I need not trouble your lordship with practical illustrations to prove what must be sufficiently evident in the nature of things.

After all, we are compelled to be contented with very loose and unsatisfactory evidence on many important points, for we cannot in the nature of things obtain better. And *nemo tenetur ad impossibile.*

At length we suppose the abstract to be sufficiently verified and the title accepted. The deed of conveyance is then prepared.

The length of this document is objected to, as in itself a principal and primary cause of complaint. This seems to me not warranted by the circumstances. It is true it

is sometimes of enormous dimensions, reaching to thirty or forty,—I have known it as far as seventy or eighty, skins of parchment,—each containing fifteen folios of seventy-two words each. It is in itself a book. But this is because, in order to make it intelligible, and its operation certain, you must express upon its face all that history which is material to the present transaction. If you are obliged to make persons parties to the deed, to get in remote outstanding interests, you must show how those interests arise,—otherwise the object of the deed would not appear. This leads to prolix recitals of previous instruments and past events, which yet are not without their use or operation, as serving to embody in the present instrument important facts, tending to elucidate the title, and after a certain time and between certain parties becoming evidence in themselves.

But mere length is a very superficial objection to make to a deed. The length is but the symptom—the disease lies deeper in the system.

The draft of this document is prepared by the purchaser's solicitor, under the advice of counsel in difficult or important cases, and is handed for approval to the vendor's solicitor, and so on to the solicitor of each separate party who is to execute it. All this is frequently a tedious and very expensive operation. Again, the evil is to be traced not to any thing unreasonable in the practice itself, (for it is surely very reasonable that deeds should be carefully perused beforehand on behalf of the different parties,) but to the system which makes so many persons necessary parties to the transaction, and to the tedious and operose form of passing it from hand to hand.

I suppose the draft of the deed to be approved and returned to the purchaser's solicitor at length. It is then engrossed on parchment, and the engrossment is handed from solicitor to solicitor for the purpose of obtaining their respective client's execution. The same routine is observed, involving a repetition of delay and expense. I

have already touched upon the great practical difficulty which sometimes occurs in obtaining the requisite signatures.

When all this is done, the matter is ripe for settlement. And if all the title deeds can be gathered together into one place, so as to be handed over to the purchaser, and no difficulty arises in distributing the money amongst different claimants, the affair may be closed.

I have not dwelt upon the inconveniences in the latter stages of the transaction, because they are really so dependent on, and necessarily incidental to, the faults inherent in the very constitution of the system, that they scarcely, as I conceive, deserve special consideration. Any attempt to apply palliatives to these minor symptoms, would, I am sure, prove fruitless. No useful reform can, I am persuaded, be accomplished, except by a thorough revision of the whole law, including both theory and practice.

The evils which I have noticed may be considered under two heads:—

First. Those which are fundamental, affecting the whole system, and which can only be remedied by a radical change.

Secondly. Those which are of a partial kind, and may be the subject of separate and distinct remedies.

Of the latter kind are the mischiefs of statutable entails, long terms of years, and permanent annual charges.

Of the former kind are the private and unauthenticated character of deeds, as symbols of title; the adherence to the obsolete evidence of possession, as the visible sign of ownership; the doctrines of equity and the adoption of notice as a basis of interests in land.

It is necessary to make this distinction between fundamental and partial objections; because, if I should fail in establishing the necessity of a radical change to cure the one, I may probably have better success in respect of the

other. Not that in my own opinion any real service will be done by operating on the smaller evils.

I have referred several times to a general registry of titles as the only practicable mode of remedying the greater evils. I wish to distinguish clearly a registry of *titles* from a registry of *deeds*. I cannot satisfy myself of any great object to be answered by mere registration of deeds. I have had some experience of a registry of deeds in Ireland, and cannot say that I have found much practical benefit from it. There is just as much trouble, expense and delay in completing a purchase in Ireland as in England, except (if I may dare to say so without disrespect to Irish conveyancers) that they are less careful and accurate in their practice. I am not sufficiently conversant with the practice in the register counties in England, as Middlesex and Yorkshire, to enable me to offer an opinion upon it. But such as that experience has been, it leads me to the belief that in no essential particular is there any difference in their favour. One only point seems to be arrived at by the registration of deeds, which is the publicity of transactions. It does not profess to alter the nature of the evidence on which titles are to depend. Indeed, I am strongly inclined to think, that mere registration of deeds is but the incumbrance of another form and an additional expense.

Registration of titles on the other hand, if practicable, completely changes the evidence of the title itself. Its proper effect would be to exhibit and be in itself a full and perfect sign or badge of ownership, which the law in all its courts (whether called by the name of law or equity) would recognize. It would supersede the use of deeds both as means of transmitting rights and as symbols of evidence. It would render it unnecessary to refer to possession as a groundwork of titles, for the registry would be in itself conclusive. It would get rid of the equitable doctrine of notice as a basis of derivative rights, for the registry would of itself operate so as to give them effect.

It would in short work a radical cure for the mischiefs we now experience. If such a system could be brought into operation, its value must be self evident.

The objections which at first sight may occur to it are these:—

First.—The impracticability of constructing it.

Secondly.—The impossibility of adapting it to the present state of things.

Thirdly.—The absolute and irresponsible power which for such a purpose must be lodged in a registering officer.

Fourthly.—The public disclosure of private transactions, particularly mortgages.

Fifthly.—The opportunity for fraud.

The first question is obviously the most important. If it be practicable to construct such a registry, its advantages are so evident as to reduce the other questions merely to matters of detail and arrangement. They present no insurmountable objections.

To point out evils, without suggesting a remedy, is worse than useless. It merely produces dissatisfaction; and therefore, having so far ventured to give an opinion as to the faults of the system, I have imposed on myself the necessity of offering some suggestions in the way of amendment.

The first step in a general registry of titles must of course be to obtain perfect surveys or maps of the whole property of the kingdom. Nor will this be difficult. By far the greater part is already complete. The tithe commutation maps include all the titheable parts. A very little filling up, enlargement and correction would make them serviceable for a wider purpose. The expenses already incurred about them will in this manner be turned to very useful account.

One of the principal difficulties in the art of conveyancing is the want of some adequate mode of describing the property to be conveyed. We describe it by metes

and bounds, by estimated quantities, by the names of fields or farms, its occupier, its parish, or other local subdivision. In short by all its local circumstances. But words are very imperfect vehicles of this kind of idea. In all ordinary transactions we resort to the far more intelligible and simple mode of delineation by map or survey. We are in the habit frequently of employing the very same machinery in deeds, either as a substantive or an auxiliary mode of description. It is found extremely convenient. Common language for such a purpose is necessarily loose and frequently inaccurate. The description of locality is after all nothing but a description of the different relations of place; and these relations cannot be expressed with any approach to certainty, except in the visible form of lines drawn upon maps.

It cannot be objected that public surveys are unsuitable as the basis of a machinery for defining rights over real property, for we already have a very large amount dependent on them—I mean tithe rent-charges.

It may be said that this is very well as regards rural districts, where the surface of the country is divided into large inclosures, which may be easily mapped with sufficient accuracy; but that it is inapplicable to crowded towns, where feet and inches are of consequence. I cannot think this. It is merely a mechanical question, and it is surely practicable in this age of surveys to construct accurate maps even of the densest parts of London. All which is required is to divide the whole extended surface into its present actual lines of occupation. Here and there a difficulty may occur, and sometimes a true boundary line may be mistaken or improperly described, and possibly the effect of a general registry of titles, by operating upon such mistakes or misdescriptions, may produce partial injustice and hardship. Accidents of this kind will be unavoidable. But these do but represent existing causes for dispute or litigation. Is the chance of wrong less, if we continue our present practice? Are not the difficulties of

describing locality in crowded towns by words infinitely greater than of expressing them by maps? Do we not in fact use maps frequently in those very cases from their peculiar usefulness?

I shall venture therefore to assume the practicability of this preliminary step.

The divisions of parishes would of course be adopted as the groundwork of such a general plan. The present tithe commutation maps in rural parishes would supply in great part all that is required. If the minute subdivision of property in extensive parishes in large towns should render it difficult to compress such maps into a convenient size, it would be easy to subdivide them.

In this manner let me suppose that we have obtained a perfect and accurate delineation of the whole surface of the kingdom. All the rights of real property must exist over or in respect of the soil, which this surface represents.

Very simple and intelligible symbols of reference, as letters of the alphabet and numbers, would adapt these maps to books of registry.

Having established this visible connexion between the *soil* represented by the survey, and the *title* to it to be recorded in the register, the mode in which that registration may be carried into operation would admit of various arrangements.

Undoubtedly the most convenient form would be a table, which should exhibit in one view the different interests existing in respect of each parcel of land, and showing synoptically the proper relationships of those interests to each other. I believe this to be quite practicable, though its practicability would not be essential to the principle of such a registry itself. Something would be required, it is true, to reduce into order and within reasonable rules some of those irregular and eccentric rights, which I have shown your lordship to be the source of so much practical inconvenience. But this would naturally follow a classification framed upon sound principles.

The *formulæ* of expressions now in use, such as the

terms *estates in fee simple, in tail, for years, or for life,* carry with them known meanings, and require little or no addition to adapt them to each particular case. If it be asked how I reconcile this with the present sometimes enormous length of deeds, I answer, that deeds do sometimes swell to a great size, yet their essential and operative parts are capable of being compressed within a short compass, and the effect of a registry would, of itself, be to supersede the greater part even of this.

The details of such a classification would have to be worked out with care. I touch upon it merely for the purpose of showing your lordship its practicability, which may perhaps be demanded in limine.

The idea of the owership of property is in itself simple, and the various derivative rights which grow out of it are by no means so intricate or various as to be incapable of intelligible classification.

The leading idea which would govern the whole would be that of the true unity and simplicity of legal ownership. In its perfect form, it comprehends the absolute right of beneficial enjoyment, and the power of dominion and disposition in the highest degree which the law permits. It is this what a purchaser or mortgagee, in all ordinary cases, proposes to himself as the object to be attained. All other rights, interests and powers may be said to be derived from it, or to be referable to it. It is the integral quantity—the unit—of which they are the fractional parts or subdenominations, all of which seem to be capable of being arranged under a few general heads, according to their different effects and operations.

For they are either (*a*) Modifications of the actual profits

(*a*) This species of qualified rights over the soil (called in the Roman law *Services*) is of two kinds;—either such as are annexed to the ownership of some other property, and are then called *appendant* or *appurtenant;* or are substantive and independent rights in themselves, they are then sometimes termed *in gross*, by way of distinction. It would be necessary to reserve a separate column in the table of registry simply for the purpose of expressing the fact of the particular kind of qualification which each

of the soil itself, such as mines, fisheries, commons, and the like, where a substantial part of the profit of the soil is, as it were, separated from the soil, and falls under a different ownership;

or they are Modifications of the ownership in point of duration of time.—For instance, they are either estates for years—or for life—or in tail—in possession—or remainder—following each other in a certain order of succession; (*b*)

parcel of property may be subject to, as that such a field was subject to such a right of mining, or to a right of common, and so on.

Whether these qualifications or services should be permitted longer than for the period allowable for other qualifications of ownership would be a subject worth consideration. If not, they would all be confined within the period of a life or lives in being, and twenty-one years after, or ninety-nine years; and any existing interests might be reduced within these limits upon fair compensation. There are qualifications or services of this kind which are sometimes highly detrimental, such as are covenants not to use land in a particular way—as not to build, or the like; and such covenants, when (as it is said) they run with the land, bind the inheritance in perpetuity. These are, I venture to think, unreasonable and mischievous. They are very well as between particular individuals in esse, but as permanent disqualifications on property in perpetuity, they fall evidently within the objection applicable to encroachments on the rights of our successors. They make property depend, as to a valuable mode of enjoyment, on roots of title, which become first remote, and then obsolete. The deed of covenant creating such a limitation on the ownership in perpetuity operates in fact as a perpetual law, but of which the origin, and the terms imposing it, must in the nature of things, in the course of a short time, be lost.

With respect to these qualifications or services, which are appendant or appurtenant to other property, these would require no separate registration. They would follow the property to which they belong. Those which are independent or in gross would require to be made the subject of a distinct registration, which would in all respects be framed in a manner analogous to that of the principal property.

(*b*) As to the subdivision of particular estates, they would follow their present rules. The question as to the extinction of long terms of years, and the restoration of entails to their ancient simplicity, is an independent one.

A registry would easily describe the interest of the tenant for years, for life, in tail, or in fee simple. The same formulæ of language which we now use would answer the purpose.

Nor would there be any difficulty in describing simply and concisely

or they are Modifications of the absolute rights of beneficial enjoyment, such as arise under trusts, confined of course, as I presume them to be, to their proper objects; (c)

the succession, one after the other, of estates in remainder to as great an extent as is usual in ordinary private deeds or wills; as, for instance, that A. was owner of an estate for so many years from such a time to such a time, with remainder to B. for his life,—with remainder to C. in tail male,—with remainder to D. in fee simple, and so on through the whole series. These being described in regular order would exhibit together by themselves in one column of a table the entire vested estate, or, as it is termed, the legal fee, divided into its fractional parts. Such an arrangement would admit of all the other different incidents, such as contingencies and conditions, trusts, powers, annual charges, qualifications, and caveats of hypothecation being set down over against the different interests which they may affect. Whether common occupying leases should be described on the registry or not seems to me immaterial. I believe in the registry districts leases not exceeding twenty-one years are not registered. If there should be a difficulty in registering the particular conditions of leases, they might be set out in separate instruments, which, like the instruments of hypothecation, might be kept by themselves.

(c) The civil law contains, I think, a more accurate discrimination of interests in real property than our own. It suggests a distinction, which we have not, between the right of beneficial enjoyment and that of dominion or disposition and inheritance. These two parts of ownership are obviously different, and are in practice frequently divided. The *dominium*, either *plenum* or *minus plenum*, that is, absolute or qualified, represents our fee simple in possession or remainder. But the distinction between the *dominium utile*, the *usus* and *usufructus*, defining the right of enjoyment, either of an absolute or a limited kind, is less perfectly represented by our law of trusts.

Trusts, when they cease to have a purely fiduciary character, or when they become mere forms of ownership, should cease to incumber a title. Such a rule would virtually extinguish all trusts not of an active and useful kind. Thus where a trust for a married woman's separate use ceased by the death of her husband, her interest would no longer be a trust, but an absolute estate. She would, to the extent of her interest, have not merely the right of beneficial enjoyment, but also the right of dominion.

It may be useful here to distinguish more particularly the various kinds of interests which are treated as equitable interests in real property and classed in our present system indiscriminately as trusts.

First. The true and genuine trust, where property is vested in a trustee in trust to apply the actual profits of it for the use of another party, as when a trust is created for the separate use of a married woman, or for infant children, or for creditors.

or they are Modifications of the absolute right of dominion and disposition, as powers. (*d*)

Secondly. A trust for sale, where the absolute dominion is lodged with the trustee for the purpose of enabling him to dispose of it with a discretion either limited or unlimited as to time and mode, &c., but with an ulterior object as regards the beneficial application of the proceeds.

These two kinds of trusts are very serviceable, and no just exception can be taken to them, provided they are confined within proper limits, and do not encroach on the term allowable for the creation of qualified interests in land. These seem to be alone the proper objects of equity jurisdiction.

But then come various others of a widely different description, and which I cannot but think will be found in practice either useless or injurious; at least only tolerable for want of some better machinery to support the interests which they are meant to serve.

1. Where property is vested in a trustee in trust to permit another party to hold and occupy and assume and exercise the full and complete functions of absolute ownership, in reality, to be the owner in everything but name. This answers to what I conceive the use to have been before the Statute of Uses—a fraudulent and collusive interest, against which our early statutes are directed.

2. Where a property is vested in a trustee in trust to dispose of it at the sole will and by the sole direction of another party. The *dominion* of the property is thus made the subject of a like collusive and fraudulent arrangement. The business of the trustee here has nothing of a fiduciary character. He has but to *make estates*, as the term is, at the will of the true owner, the cestui que trust.

As regards the two latter kind of trusts they are mere forms of ownership. The objection to them is not one of time or limit, but to their essential nature. They are the sources in great part of those nominal, unreal and fictitious interests in real property which constitute the most mischievous feature of our present system. Whatever may have been their past services, I am persuaded they are susceptible of no effectual reform short of abolition.

There is a further class of equitable interests in real property arising by the operation of agreements.

Thus, if I agree to sell an estate to your lordship, equity not only enforces the completion of the contract, but treats it ab initio as completely fulfilled; adopting the agreeable fiction that whatever ought to be done is to be considered as done. So that from the time an agreement is made for sale, the purchaser in the contract is regarded as the true owner

---

(*d*) See note (*d*), p. 96.

Again, all the foregoing classes may be divided into two general heads, those which are vested and absolute—or contingent and defeasible. (*e*)

—the vendor is simply considered as entitled to the price agreed for. So if the purchaser dies whilst the contract is yet incomplete, the estate purchased descends as realty to his heir at law,—the price payable to the vendor in like manner goes as personalty to his next of kin. The ownership of the estate is in fact, in the eye of equity, absolutely transmuted by force of the contract. Agreements of this description ought by the Statute of Frauds to be written, that in this manner, at least, some certain evidence of them might be preserved. Equity, however, does not adhere strictly to this rule, and gives effect frequently to contracts by parol—mere conversations by word of mouth—between parties, provided there be any overt act to establish the fact of the contract conclusively—as if the purchaser take possession and cut timber, or the like. Hence the transmutation of ownership is made dependent upon obscure accidents. How inconsistent is this with all the policy of law, and with all right reason. It was thought necessary heretofore that the change of ownership of real property should be evidenced by actual delivery—by processes recorded in our courts—by deeds enrolled, or accompanied with other solemnities and formalities. The Statute of Frauds, at least, expressly guarded against any but written documents having so great an effect. All this is defeated by the doctrines of equity; and questions are introduced into titles—incapable of being solved with any approach to certainty—for must not this be the case when the descent of an estate through one channel or another —as realty or personalty—may depend on a parol contract for sale unevidenced by writing, but established by a single transitory act such as the cutting of a few trees?

And is there any good ground for the rule? Has it any foundation in truth? Is it agreeable to reason and the true policy of law, that when an agreement has been made between parties, which yet remains incomplete, waiting, perhaps, for sufficient proof to establish it—the settlement of some point in dispute—is it, I say, reasonable or politic to anticipate and give effect to it beforehand—to change the relative status of the two parties to the contract prematurely, so as completely to reverse their characters? An agreement for sale of a real estate is, like any other *pactum*, one which ought to be enforced; but to enforce it is a different thing from giving effect to it as if it were already completed.

It may perhaps be said that in this way equity resolves many of the difficulties arising during the long interval which frequently occurs between the inception and completion of a contract. It may be so now—but a registry of titles, which would reduce contracts to certainty as to

---

(*e*) See note (*e*), p. 96.

As to pecuniary charges, capable of being enforced against real property, as securities for money, they may, I

time of fulfilment, would take away all further occasion for the continuance of the rule.

Precisely the same observations may be made as regards agreements for the creation of other derivative interests in real property; for in the same way as such an agreement may be made to affect the entire ownership, it may also be made to affect it partially.

To treat the rights of parties under agreements of this kind as being in the nature of trusts, seems to me a great distortion of the case. If I agree with a party to sell to him an estate, or to create for his benefit a derivative interest, I make myself liable to the consequences of the contract—but no more; I cannot be said to assume thereby the character or duties of a trustee. A doctrine of this kind may be tolerable merely as a means of establishing a useful jurisdiction—in default of a better—but in itself it will, I think, be found at variance with all sound reason.

Again, there is another class of equitable interests, of which I have given an instance, where property is *charged* with the payment of money, as where a testator devises his estate subject *to a legacy* or portion; here the money charged is treated as an equitable interest, in the way I have before described. The party holding the estate is regarded quoad hoc a trustee. Charges of this kind are of various sorts, but all agree substantially as to their general qualities. Now all pecuniary charges of every kind—which are intended to affect real property simply by preventing the owner from alienating it without payment of the incumbrance, and by giving the incumbrancer certain remedies for securing the payment of his debt or charge—all such debts and charges, I say, are not trusts, but hypothecations; and this is the true character of all pecuniary charges on property of every kind under our law. Even the mortgage, which by its name imports an actual traditio in mortuo vadio, is in fact nothing but an hypothecation; for in all cases the contract is that the debtor shall be suffered to remain in actual possession of the property pledged until the security is enforced.

All which can be said in apology for the doctrine of equity which treats them as trusts, is, that there is no machinery capable of giving effect to them as hypothecations; but a general registry of titles would supply such a machinery.

There is a further, and, I think, the last class of equitable interests in real property. Where an estate is directed to be sold and the proceeds divided amongst particular persons, the right to the money which it is anticipated will be produced by the sale becomes an actual and immediate interest in the land. I have explained the mode in which this takes place. This is the most violent stretch of equity doctrines; and it is so repugnant to reason and opposed to general convenience, that in

think, be classed under the general head of *hypothecations;* the property being in all such cases pledged, and made answerable for the satisfaction of the claims.

every properly drawn deed or will containing trusts of this kind, clauses are added expressly excluding its application. A late act of parliament attacked the doctrine, but for some reason was repealed in the following session. It is a doctrine which I am sure is never practically applied without injury.

It would probably be right to give a speedy and sure remedy to cestui que trusts who may anticipate a misappropriation of their trust funds; but this can only be done by converting the right to the proceeds of the sale under the trust by a kind of anticipation into an hypothecation. A registry of titles would afford a very simple machinery applicable to this purpose.

I think it will appear from what I have said, that there are but two kinds of equitable interests in real property which can be usefully preserved, namely, strict and genuine trusts; and that all other kinds are either positively injurious, or belong to a different species of interest.

(*d*) Powers are in fact parcel of the ownership. They are qualified rights of dominion and disposition. Both trusts and powers should, I conceive, be confined within the period fixed for all qualified interests, viz. a life or lives in being, and twenty-one years afterwards. The object should be to keep the ownership of the estate as simple as possible, so that the beneficial use and the absolute right of dominion should never be separated longer than for this period. The mischief of trusts and powers of unlimited duration in point of time, is precisely the same as that of every other qualification of the ownership. I of course except the case of charitable trusts.

(*e*) It would be necessary to describe distinctly and accurately all contingent or conditional interests. These are of various kinds. Under whatever name they come, they all operate so as either to create new or accelerate existing interests—either by determining—displacing—or destroying others. They may all be classed under one general head, for which we may borrow the term *substitution* from the Roman law. There do not seem to me to be any varieties of this kind of interest which need special classification. These substitutions would simply require a careful definition of the events on which they were to depend, and the extent of interest which they were intended to affect,—an operation in my opinion much more easily and intelligibly represented in the tabular form of a registry, than by the present machinery of words in deeds. It is sometimes difficult to express with exact accuracy some partial operation of a particular contingency, and not unfrequently the intention of parties is defeated by inaccuracies in this particular. A tabular arrangement, by

The principle of hypothecation in itself is simple enough. It is a pledge of a valuable thing as a security for the repayment of money, the owner himself being permitted to retain actual possession. It differs wholly from an actual interest in the thing pledged. It confers a right on the creditor to resort to the security to repay himself in several ways—either by perception of profits—or by sale—or by foreclosing the right of redemption. This, in all its varieties, is the true principle of all hypothecations. Mortgages, equitable charges, portions, in fact pecuniary charges of all kinds, do not vary from each other in these qualities. They seem to me to differ essentially from trusts, with which our doctrine of equity confounds them.

A registry of titles would of course be ineffective without in some measure disclosing these dealings with property. It is a question of debate how far they ought to be fully described, so as to be made notorious, in order, it is said, to prevent fictitious credit. There may be a difference of opinion on this point. As far as I can judge, the general prejudice is in favour of secrecy; and I think any scheme of registration which should endeavour to establish an opposite practice would not meet with success. With this view, it seems to me very practicable to make a public registry simply describe by a single entry, as by the term *caveat*, the fact of hypothecation, leaving the terms and particulars of each hypothecation to be described by its own distinct instrument, fitted to the registry by some symbol of reference, and preserved either separately and secretly on files, or in some other simple way. This plan would answer the purpose of placing *a visible legal check* on the alienation of the property incumbered, and yet without such a disclosure of private transactions as would

which all vested interests shall be described seriatim in one column, and all contingent or substituted interests seriatim in a column immediately opposite, exhibiting at an instantaneous view the nature and operation of each contingency and the extent of its action, would, I think, be more convenient as a mode of description than our present practice.

be objectionable even to the most fastidious owner of an estate. Compare the indistinctness of such a notice with the exposure of private affairs constantly happening through the offices of solicitors, conveyancers, stationers and other persons through whose hands private deeds now pass.

The effect of hypothecation would be to confer on the creditor the right of enforcing his security through the operation of the registry; the registrar would give effect to the security by making the necessary changes of title on the face of the registry; and in the meantime the caveat would prevent a sale or improper conveyance by the owner. A similar effect is now given to a distringas upon stock in the public funds, which must be removed before any transfer can be made. The order of priority of date would of course confer priority of right between incumbrances. So soon as the hypothecation was at an end, the caveat would be removed, and the title would be to the world as if no such transaction had ever taken place, —a result, in many cases, almost as desirable as the suppression of its actual existence. I do not consider rents as a class of interest requiring a separate notice on the registry. According to the suggestions already made, they would be reduced to a single kind, namely, to such as are incidental to actual subsisting reversions, such as arise on farm leases or building leases. They would follow these reversions, and thus would have all their present effect given to them as incidents to the title to the reversion. All other kinds of rents would be converted into redeemable charges and would partake of the character of annuities or rent-charges. These do not differ essentially from charges of gross sums of money. They confer similar rights over the property charged with them, and may in fact be classed under the general head of *Hypothecations*.

I will not trouble your lordship with mere details as to the form in which a tabular arrangement of the different interests which I have described may be constructed, so as to exhibit at one view an accurate map or ground plan as

it were of the titles to real property. This synopsis would be connected with the parochial maps or surveys by the simple machinery of symbols of reference, alphabetical and numerical, each letter and figure, or so many letters and figures, being the index to their respective titles.

The most convenient divisions of such a registry would be into local districts, about large enough each to occupy the time of a single registering judge. The circuit of such districts would vary—probably on an average each county would require three or four subdivisions. If any benefit were expected from a central or metropolitan registry, it might be secured through a duplicate registration in London, which would be a mere mechanical transcript of that in the country. I do not, however, see any sufficient object in this. Local situation is the real guide in all ordinary affairs respecting real property, and I see no reason why they should not be transacted actually on or near the spot. Such a method is surely as likely to suit general convenience as the present practice, according to which the place for the final settlement of these matters depends on the accidental place of custody of title deeds.

But is it possible to make a registry of this nature available as a means for giving effect to the various modes by which property may be obtained, as by purchase, prescription, succession, descent, or devise?

A registry of the nature which I have described would require the direction of a really efficient responsible officer conversant in the law of real property. Many such are to be found at the bar amongst practising conveyancers,—men who would be as well or better qualified to pronounce judicially upon points of real property law even than the highest equity judge. Men of this class must of course be tempted from a lucrative profession by corresponding remuneration; but the superior ease, dignity and certainty of income attending a judicial office would make up for some loss of income.

A registering officer presiding over such a district court

would be virtually a judge in the first instance in matters of real property. His operations upon the registry would be judicial acts, and would have, if unappealed against and unreversed, the effect of law. In cases of doubt or dispute, a very simple machinery might provide a remedy for enabling parties thinking themselves aggrieved to appeal.

And is not the establishment of such a judicial officer agreeable to the evident wants of society? Is not this indicated by that constant recurrence to counsel which I have mentioned, as the ordinary practice in conveyancing? What is this but an attempt to reach in an imperfect and extra-judicial manner a formal sentence upon the validity of titles, upon which men may practically act? Such a practice may be regarded as a sign indicating the remedy required. If the state of the law is such as to require these *responsa prudentum* before men can venture to complete purchases or mortgages, it seems to me incumbent on the legislature to provide them in a formal authoritative shape—for the poor as well as the rich—in small affairs as well as large ones.

Nor would the expense be an objection, as the salary of a judge of this kind would but represent the income now paid to him in one way or another by the public in the shape of casual fees. Indeed, in point of expense, the public would, upon the whole, unquestionably be prodigious gainers by such an arrangement.

I am not insensible to the difficulties and objections to such a measure; but the question lies between a choice of evils. Either we must remain as we are, merely applying minor remedies, which will produce no substantial improvement;—or we must try the effect of a registration of deeds, of the inefficacy of which I think we have already sufficient experience, and against which, as involving in its very principle of indiscriminate notice too much exposure of private affairs, I think there would be an insurmountable prejudice;—or (which seems to be the

only remaining alternative) we must adopt a registry which shall have a judicial operation.

To the latter plan it may be objected that it would be opposed to all established principles, but I think this is not so. The title to 800 millions of property in the funds is trusted to a mere inscription in the bank books, and its changes of ownership are effected through the simple agency of bank clerks. The title to real property would, it is true, be more complicated, and would require a higher description of machinery and superior heads, but the principle would not be different. Let me ask, whether the power of transferring real property with as much ease as money in the funds, would not be a great addition to its value? We know that one of the real causes of the high value of the funds, is the facility with which parties can deal with it. The same result would no doubt be obtained by a similar practice as regards real property.

Again—can it be objected that a judicial power of this kind is foreign and unsuited to us? Consider that all the *personal property* of the kingdom—involving with it, through leaseholds interests, and the equitable doctrine of trusts, a vast mass of landed property—is already under the absolute control of the Ecclesiastical Courts. The grant of probate or administration by these courts—many of them of a low and inferior kind—operates instantly to confer a title to the whole personal estate of a testator. Can there be anything more summary in the power to be conferred on a judicial registrar of real property? With these instances directly in point, I will venture to assume that such an objection cannot be maintained.

I will not weary your lordship with suggesting practical methods of putting such a machinery into action, so as to enable it to effect all the ordinary changes of property in cases of sales, exchanges, mortgages, &c. Whether it should be like the transfer of stock in the public funds, or in any other more formal manner, or by a different kind of instrument, is matter of mere detail.

But there are some points in which I think peculiar benefits can be obtained by such a plan.

In the cases of settlements or wills, the ownership of property is frequently changed upon the happening of some contingent event, but there is at present no way in which the record of that event can be preserved. This leads to great difficulty and sometimes uncertainty of titles. The circumstances on which such changes are made dependent, are frequently obscure in themselves, and, after a certain lapse of time, it becomes scarcely possible to trace them. The most frequent of these contingencies are the deaths of parties, or failure of particular lines of issue. A great deal of the trouble, expense and delay in proving titles may be traced to this source. A registry which should afford the opportunity of proving and recording all facts of this kind at the time would be very valuable, if in this respect alone. Under the old law, before the introduction of uses and trusts, no transmutation of ownership could take place under circumstances of this kind except by actual entry on the land, which afforded some sort of visible sign of the contingency having occurred. But now, under the present law, the mere operation of the deed is sufficient to effect this transmutation, so that whilst the evidence of these uncertain facts is in suspense, there is no criterion by which it is possible to determine the actual present state of ownership. Indeed, the same remark will apply to all extrinsic and collateral matter of evidence affecting the title to real property.

So also in the case of descents and intestacies. These now are really very formidable dangers to title. Who can tell when he buys property held under an apparent intestacy and descent, that some will may not be produced defeating his title? I have known such a case myself. This appears to me one of the weakest parts of our system. Wills are carelessly kept in the lifetime of testators, and, as I believe, are not unfrequently after death suppressed or destroyed, or at any rate overlooked. That

such cases do not come more frequently under public notice, is but attributable to the accident of circumstances which usually covers them in oblivion.

With respect to wills themselves, the present practice need not be altered, except that after death they should be proved (a process which, as regards real property, can now only be effected by a bill in chancery), and their effect would have to be represented upon the registry, an operation which must be entrusted to the registering officer, subject to a power of appeal to some superior court in case a question of construction should arise, should parties be dissatisfied with the registrar's judgment. This would but represent the present tedious and expensive process of obtaining a judicial determination by recourse to the Court of Chancery, a process frequently exhausting the property involved. And this reference to the superior courts may be made simply and expeditiously, by a method analogous to that in which the opinions of the judges are obtained in questions upon tax appeals. A short statement, embodying the substance of the case and the judgment of the registering officer might be followed summarily by the authoritative dictum of the superior court, either confirming or correcting that judgment. The superintendence of a responsible public officer would be at least as effectual a check upon fraud and collusion, as any other method now in practice, or which could be devised.

The whole machinery of such a registry would in fact be worked by the presiding mind of the registering officer, a judge whose acts or omissions would be open to correction by superior courts. If such a system were to have the effect of drawing off some portion of the jurisdiction, which now endangers the whole existence of the Court of Chancery, such a result would not, I think, be without its advantages. It might have the effect (which I think would be a salutary one) of restoring some of the jurisdiction over real property to our common law courts,

for the remedy by mandamus would be as applicable to a registrar of real property as to any other public officer,—and the return to such a process would raise questions of title in a simpler and less expensive form than the present method of a chancery suit. A mere caveat on the registry during the suspense of an appeal would be sufficient to save the rights of appellants.

It will be objected that the summary power conferred in this manner on a public officer may lead to hardship and wrong. In some few and trifling cases this is not only probable, but I fear inevitable. No human machinery can be invented which shall not be subject to such a contingency; but such an objection is equally applicable to judicatures of all kinds. Judges may be corrupt, or ignorant, or mistaken. We do not however allow ourselves to act on such possibilities. Opportunities of correcting grievances arising from this source would easily be arranged, and if some may perchance prove beyond remedy, they must be set against the parallel instances of the same kind under the present system.

And if it be said that the law is too tender of the rights of individuals to trust them to such a power, let me ask your lordship to revert to what I have before pointed out—the rude and summary way in which even equity permits rights, which according to her own rule are clear, to be frustrated by mere technicality. How precarious is the tenure of all equitable interests. The accident of an outstanding legal estate, a mere ideal and imaginary thing, reverses the order of priorities between conflicting equities, and makes the last first and the first last.

The same policy may be observed in our old law of disseisin, by which mere usurpers of property were enabled to turn their wrongful titles into rightful ones through certain formalities, with the description of which I need not trouble your lordship.

But how shall we adapt such a system to the present state of things, so as to bring it into operation? We can-

not, I think, attempt any forcible or violent alteration. We cannot have an itinerant commission ransacking the deed-chests of each landowner, in order to extract the true state of the title to his property. This would not be tolerated. But I think we may attain the end without recourse to any such extreme measures. Establish a registry upon the principle I have suggested, and offer it to purchasers and mortgagees.—We may be very sure they will readily adopt it. They will require before accepting a title that it shall have undergone the scrutiny necessary to establish its validity. This scrutiny would stand in the place of the present investigation by counsel. It would be carried on by the registering officer, whose labours would at first be thus comparatively heavy, but would gradually become lighter as the registry came into full operation. A vendor or mortgagor would thus be required before he could complete a sale or mortgage to have his title recorded on the registry. The registering officer would through himself and his clerks pursue the same process of investigation which a purchaser's or mortgagee's solicitor now does. The title deeds would be examined, and their substance and effect reduced within the form of the registry. The deeds would then probably remain in the custody of the registrar, subject to any provisions which might be considered proper for making them accessible by proper parties.

Supposing by the operation of such a registration the rights of any parties should be excluded, proper remedies might be reserved to the parties so excluded as against the party who properly would be answerable to them for compensation, though as against the purchaser or mortgagee who would have purchased and obtained a legal title without notice of the supposed excluded rights, all remedy would be at an end. In this respect registration would have the same effect as a conveyance of the legal estate to a purchaser or mortgagee without notice now has against parties having latent equitable interests.

There seems to me nothing impracticable in all this. In

the course of years, the natural progress of things and the changes which property continually undergoes, would bring within the operation of the registry the whole, or at least the greater part, of the property of the kingdom.

I mention one other practical point which would require provision. I mean the subdivision of particular items of property after the first formation of the original survey. In all cases of such subdivision, the subdivided parts may be represented easily by small supplemental surveys, which would easily be connected by symbols of reference with the original.

I have not noticed the case of copyhold or customary property, as distinct from ordinary tenures. This species of interest is in fact a kind of graft upon the freehold. The freehold title lies underneath it. The title to a manor and the freehold of the copyholds within it, belongs to the lord, and passes by its own independent title. It seems to me unnecessary to bring the representation of copyhold interests into a general registry. They may be safely and conveniently left as they are, described by manorial limits, and with titles recorded on the court rolls. All which would be necessary to be shown on the face of the general registry, would be the mere fact of the existence of such rights; their nature and particulars would be ascertained as they now are. The devolution of the freehold title, subject to the copyhold and customary rights, would be shown by the general registry.

I have supposed in the outline which I have suggested that the registry is to be confined simply to those acts which immediately affect the title to real property. And whatever provision may be made for the registration of derivative interests, it seems to me important to keep the title to the realty as free and disincumbered as possible. A supplementary or collateral registration of dif-

ferent acts affecting derivative rights, such as hypothecations, &c. would undoubtedly be as useful and important with respect to those particular interests as the general registry would be as regards the realty itself. The mechanical arrangement of such a collateral or supplementary registry would be a matter of detail, as would also be the manner and extent of its operation.

The one great point, with which I conceive nothing should be permitted to interfere, would be the exhibition, in a clear, simple and intelligible form, of the true title to the ownership of the realty.*

* The object of a general public registry would be to define the rights of real property *relatively* to each other. The details of any modification of a particular interest, such as a lease or a trust, would be immaterial for this purpose, and need not therefore incumber the principal register. What is desired is—to express clearly on the face of the public record the *objective* character of the title—that which it is a matter of concern to society at large to be made acquainted with—its *subjective* nature, as, for instance, the particular regulations constituting the internal economy of a charitable trust, would be more conveniently treated as a collateral matter and provided for by a distinct mode of registration. The same may be said as to leases; and here I may add that on consideration, it seems to me desirable that all leases which answer the description of occupying leases—such as in the Roman law were distinguished as *emphyteuses*—where there is a real relationship subsisting between the owner of the soil and the tenant—should be treated as distinct from the ownership itself and be registered in a separate column. The principal register would in that case describe under one column the different estates in order, as for life, in tail, or in fee; and a distinct column would contain the notice of such leases. A farm lease for twenty-one years, or a building lease, would be noticed in this manner. A collateral book of registry would preserve the title to these subordinate interests, setting forth all mutual engagements of landlord and tenant, as covenants to build and the like. This collateral register might be framed on the same pattern as the principal register. So where underleases are created, which is a common case, these might again be carried off to a distinct book of registry. In this manner each title to each kind of interest by itself would be preserved distinctly, nor could this reach to any inconvenient extent.

It would indeed be necessary to consider to what extent the creation of derivative interests one on the other should be permitted. The policy of our law is distinctly directed against the subderivation of rights out of rights in

I have written this letter in the midst of occupations of general business, with less care I admit than the subject in itself requires. It is more than probable that in so wide a field I have overlooked many important points for consideration;—and I should have hesitated before committing myself to a step which may provoke and may deserve criticism;—but the fear of this weighed less with me than

themselves derivative. It would perhaps be impossible to strain the rule to its full extent after the laxity which has so long prevailed, but reason and convenience both require that a limit should be placed somewhere. If only one underlease were permitted to be grafted upon an original lease, that is, if a sublessee were not allowed to carve any farther derivative lease out of his interest, some check would be placed on the present practice of gambling in land which takes place near great towns, particularly in the neighbourhood of the metropolis. Tenures of this description are most dangerous, and for the sake of parties who may be tempted to lay out their capital upon them, it would be well to place restrictions upon them. It frequently happens that a large plot of ground is taken by some building speculator at so much rent per acre, under covenants, binding the lessee to do various things—as for instance, to build houses of a certain value, to insure and keep them insured, &c.; and there is usually a condition inserted for determining the lease upon the breach of any one—even the least of the covenants. The original speculator then proceeds to carve out his lots to other minor speculators, who may or may not themselves expend their capital on the property, but who may again sublet to others, and so the work of subletting may go on. These subdistributions of the property are in all probability in smaller parcels. There is no limit to the multiplication of these derivative leases and underleases. Now, consider, my lord, the position of all these parties; their whole capital embarked is not unfrequently made dependent on a series of the most precarious accidents—as for instance, the fulfilment of a covenant for insurance by the original lessee or any of the intermediate sublessees. Wherever a proviso is introduced, as is usually the case, determining the lease on nonfulfilment of covenants, such an omission works an incurable forfeiture. Having had experience of the dangerous tenure of property so circumstanced, I may say without exaggeration that it is quite unsafe for purchase or mortgage. The effect of preventing underleases of this description would be to compel an immediate and direct contract of tenure between the actual owner of the soil and the party embarking his capital in improving it, and such a result, though tending in some degree to check a spirit of over-speculation, would even in th' ink, be found advantageous.

the desire I feel of pointing attention at the present moment to a matter, I believe, of serious importance, and bringing into discussion the question of a general registration of titles to real property.

I have the honour to be,
My Lord,
Your Lordship's very obliged
and faithful Servant,

HENRY SEWELL.

13, GRAY'S INN SQUARE,
June, 1846.

POSTSCRIPT.—I have not perhaps sufficiently pointed out the difference of operation between a general registration of deeds, and a general registry of titles as regards the disclosure of incumbrances. Such a disclosure is the very object and principle of a registration of deeds. It forms no necessary part of a registry of *titles*. On the contrary, the object of the latter is simply to exhibit the real beneficial ownership; and it only involves a notice of incumbrances, so far as may be necessary to preserve the rights of incumbrancers. With a registry, superintended by a responsible judicial officer, it may perhaps be unnecessary that any public notice of hypothecation should be exhibited on the face of the registry. A private registry would answer the purpose of the caveat equally well; or inasmuch as the transfer of ownership would no longer be an act resting on the parties, but on the public officer, it would be unnecessary to give general publicity to the register, which would in that case only be accessible by parties having interests in the property. In this respect it would resemble the inscription in the bank books of the title to property in the public funds.

I have not noticed in my letter several kinds of property coming under the general description of real property, and go-

verned by similar rules, such as manors, advowsons, franchises, offices, &c. The important question is as to the title to the soil. The other class of rights which I have mentioned are comparatively few and unimportant; but whatever truth there may be in my remarks is equally applicable to one species as to another. If the principle of a general registry of titles as regards the ownership of the soil were adopted, it would be very easy to adapt it to every other kind of interest coming under the denomination of real property.

LONDON:
PRINTED BY C. ROWORTH AND SONS,
BELL YARD, TEMPLE BAR.